No. 22-13005-F

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

DONALD J. TRUMP,

Plaintiff-Appellee,

v.

UNITED STATES OF AMERICA,

Defendant-Appellant.

On Appeal from the United States District Court
for the Southern District of Florida

MOTION FOR PARTIAL STAY PENDING APPEAL

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLSOURE STATEMENT

Pursuant to Eleventh Circuit Rule 26.1-1, counsel for Defendants-Appellants certify that the following have an interest in the outcome of this appeal:

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Trusty, James M.

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Dated: September 16, 2022

/s/ Juan Antonio Gonzalez
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United States Attorney

INTRODUCTION AND SUMMARY

The district court has entered an unprecedented order enjoining the Executive Branch's use of its own highly classified records in a criminal investigation with direct implications for national security. In August 2022, the government obtained a warrant to search the residence of Plaintiff, former President Donald J. Trump, based on a judicial finding of probable cause to believe that the search would reveal evidence of crimes including unlawful retention of national defense information. Along with other evidence, the search recovered roughly 100 records bearing classification markings, including markings reflecting the highest levels of classification and extremely restricted distribution. Two weeks later, Plaintiff filed an action seeking the appointment of a special master to review the seized materials and an injunction barring the government from continuing to use them in the meantime. The court granted that extraordinary relief, enjoining further review or use of any seized materials "for criminal investigative purposes" pending a special-master process that will last months. A36-A37.[1]

Although the government believes the district court fundamentally erred in appointing a special master and granting injunctive relief, the government seeks to stay only the portions of the order causing the most serious and immediate harm to the government and the public by (1) restricting the government's review and use of records bearing classification markings and (2) requiring the government to disclose those

[1] References to "A__" refer to the Addendum to this motion.

records for a special-master review process. This Court should grant that modest but critically important relief for three reasons.

First, the government is likely to succeed on the merits. The district court appointed a special master to consider claims for return of property under Federal Rule of Criminal Procedure 41(g) and assertions of attorney-client or executive privilege. All of those rationales are categorically inapplicable to the records bearing classification markings. Plaintiff has no claim for the return of those records, which belong to the government and were seized in a court-authorized search. The records are not subject to any possible claim of personal attorney-client privilege. And neither Plaintiff nor the court has cited any authority suggesting that a former President could successfully invoke executive privilege to prevent the Executive Branch from reviewing its own records. Any possible assertion of executive privilege over these records would be especially untenable and would be overcome by the government's "demonstrated, specific need" for them, *United States v. Nixon*, 418 U.S. 683, 713 (1974), because they are central to its ongoing investigation.

Second, the government and the public would suffer irreparable harm absent a stay. The district court recognized the government's overriding interest in assessing and responding to the national-security risk from the possible unauthorized disclosure of the records bearing classification markings. The court thus stated that its order was not intended to "impede" an ongoing "classification review and/or intelligence assessment" of those records by the Intelligence Community (IC). A14-A15. But as the head of the

Counterintelligence Division of the Federal Bureau of Investigation (FBI) explained in a sworn declaration, the criminal investigation is itself essential to the government's effort to identify and mitigate potential national-security risks. A38-A43. The court's order hamstrings that investigation and places the FBI and Department of Justice (DOJ) under a Damoclean threat of contempt should the court later disagree with how investigators disaggregated their previously integrated criminal-investigative and national-security activities. It also irreparably harms the government by enjoining critical steps of an ongoing criminal investigation and needlessly compelling disclosure of highly sensitive records, including to Plaintiff's counsel.

Third, the limited stay sought here would impose no cognizable harm on Plaintiff. It would not disturb the special master's review of other materials, including records potentially subject to attorney-client privilege. Nor would a stay infringe any interest in confidentiality: The government's criminal investigators have already reviewed the records bearing classification markings, and the district court's order contemplates that the IC may continue to review and use them for certain national-security purposes.

Finally, because the government and the public will suffer irreparable injury absent a stay, the United States respectfully asks that the Court act on this motion as soon as practicable.

STATEMENT

A. Background

1. In the year after Plaintiff left office, the National Archives and Records Administration (NARA) endeavored to recover what appeared to be missing records subject to the Presidential Records Act (PRA). A44. The PRA provides that the United States retains "complete ownership, possession, and control of Presidential records," 44 U.S.C. § 2202, which the law defines to include all records "created or received by the President" or his staff "in the course of conducting activities which relate to or have an effect upon" the President's official duties, *id.* § 2201(2). The PRA specifies that when a President leaves office, NARA "shall assume responsibility for the custody, control, and preservation of, and access to, the Presidential records of that President." *Id.* § 2203(g)(1).

Plaintiff ultimately provided NARA with 15 boxes of records in January 2022. A44. NARA discovered that the boxes contained "items marked as classified national security information, up to the level of Top Secret and including Sensitive Compartmented Information and Special Access Program materials." *Id.* Material is marked as Top Secret if its unauthorized disclosure could reasonably be expected to cause "exceptionally grave damage" to national security. Exec. Order 13,526 § 1.2(1) (Dec. 29, 2009).

NARA referred the matter to DOJ, noting that highly classified records appeared to have been improperly transported and stored. A63-A64. DOJ then sought access to

the 15 boxes under the PRA's procedures governing presidential records in NARA's custody. A44-A45; *see* 44 U.S.C. § 2205(2)(B). Plaintiff, after receiving notification of DOJ's request, neither attempted to pursue any claim of executive privilege in court, *see* 44 U.S.C. § 2204(e), nor suggested that any documents bearing classification markings had been declassified. *See* A45.

2. The FBI developed evidence that additional boxes remaining at Plaintiff's residence at the Mar-a-Lago Club in Palm Beach, Florida, were also likely to contain classified information. On May 11, 2022, Plaintiff's counsel was served with a grand-jury subpoena for "[a]ny and all documents or writings in the custody or control of Donald J. Trump and/or the Office of Donald J. Trump bearing classification markings." A48.

In response, Plaintiff's counsel and his custodian of records produced an envelope containing 38 documents bearing classification markings. A76-A77. Plaintiff's counsel represented that the records came from a storage room at Mar-a-Lago, where all records removed from the White House had been placed, and that no such records were in any other location. A76-A77. Plaintiff's custodian also certified, "on behalf of the Office of Donald J. Trump," that a "diligent search was conducted of the boxes that were moved from the White House to Florida" and that "[a]ny and all responsive documents accompany this certification." A50. Again, Plaintiff did not assert any claim

of privilege, and did not suggest that any documents bearing classification markings had been declassified.

3. The FBI uncovered evidence that the response to the grand-jury subpoena was incomplete, that classified documents likely remained at Mar-a-Lago, and that efforts had likely been undertaken to obstruct the investigation. On August 5, 2022, the government applied to a magistrate judge for a search warrant, citing 18 U.S.C. § 793 (willful retention of national defense information), 18 U.S.C. § 2071 (concealment or removal of government records), and 18 U.S.C. § 1519 (obstruction). A54. The magistrate judge found probable cause that evidence of those crimes would be found at Mar-a-Lago and authorized the government to seize, among other things, "[a]ny physical documents with classification markings, along with any containers/boxes ... in which such documents are located." A96, A98. The magistrate judge also approved the government's proposed filter protocols for handling any materials potentially subject to personal attorney-client privilege. A87-A88.

The government executed the warrant on August 8, 2022. The search recovered roughly 11,000 documents from the storage room as well as Plaintiff's private office, roughly 100 of which bore classification markings, including markings indicating the highest levels of classification. A17 & n.4; *see* A51 (photograph); A115-A121 (inventory). In some instances, even FBI counterintelligence personnel required additional clearances to review the seized documents. Dist. Ct. Docket Entry (D.E.) 48 at 12-13.

B. Proceedings below

1. Two weeks later, Plaintiff filed a "Motion for Judicial Oversight and Additional Relief" asking the district court to appoint a special master to adjudicate potential claims of executive and attorney-client privilege, to enjoin DOJ from further review and use of the seized documents, and to order the government to return certain property under Rule 41(g). The district court granted Plaintiff's motion in part, authorizing appointment of a special master to "review the seized property," make recommendations on "assertions of privilege," and "evaluate claims for return of property." A36. Pending the special-master review, the court enjoined the government from "further review and use" of all seized materials "for criminal investigative purposes." *Id.* The court stated that the government "may continue to review and use the materials seized for purposes of intelligence classification and national security assessments." A37.

The district court acknowledged that the exercise of equitable jurisdiction to restrain a criminal investigation is "reserved for 'exceptional' circumstances." A21 (quoting *Hunsucker* v. *Phinney*, 497 F.2d 29, 32 (5th Cir. 1974)). The court also concluded that Plaintiff had not shown that the court-authorized search violated his constitutional rights. A22. But the court concluded that the other considerations set forth in *Richey v. Smith*, 515 F.2d 1239 (5th Cir. 1975), favored the exercise of jurisdiction, principally because the seized materials included some "personal documents." *Id.*; *see* A22-A25. The court similarly found that Plaintiff had standing because he had made "a colorable

showing of a right to possess at least some of the seized property," namely, his personal effects and records potentially subject to personal attorney-client privilege. A26.

The district court then held that "review of the seized property" was necessary to adjudicate Plaintiff's claims for return of property and potential assertions of privilege. A27-A32. As to attorney-client privilege, the court concluded that further review would ensure that the attorney-client filter process approved in the warrant had not overlooked privileged material. A28-A29. The court did not resolve the government's arguments that a former President cannot assert executive privilege to prevent the Executive Branch from reviewing its own records and that any assertion of privilege here would in any event be overcome. A29-A30. Instead, the court stated only that "even if any assertion of executive privilege by Plaintiff ultimately fails," he should be allowed "to raise the privilege as an initial matter." A30-A31.

2. The government appealed and sought a partial stay of the order as it applied to records bearing classification markings. D.E. 69. The court denied the motion. A4-A13. The court declined to address the government's argument that those records are not subject to any plausible claim for return or assertion of privilege, instead referring generally to "factual and legal disputes as to precisely which materials constitute personal property and/or privileged materials." A7. The court reiterated that its order does not bar the IC's review and assessment of the records bearing classification markings and suggested that even criminal investigative steps are permitted if they are "truly ... inextricable" from the IC's activities. A11-A12. But the

court gave little further guidance on distinguishing between permitted and prohibited investigative steps.

Finally, the district court confirmed that as part of its special-master review, the government must allow Plaintiff's counsel to inspect the records bearing classification markings. D.E. 91 at 4. The court directed the master to prioritize review of those records, and directed him to submit all recommendations by November 30, 2022, subject to extensions. *Id.* at 5.

ARGUMENT

In determining whether to grant a stay pending appeal, this Court considers (1) the likelihood of success on appeal; (2) whether the movant will suffer irreparable injury; (3) the balance of hardships; and (4) the public interest, which merges with harm to the government. *Nken v. Holder*, 556 U.S. 418, 434-435 (2009); *Hand v. Scott*, 888 F.3d 1206, 1207 (11th Cir. 2018). "Ordinarily the first factor is the most important." *Garcia-Mir v. Meese*, 781 F.2d 1450, 1453 (11th Cir. 1986). Here, all factors strongly support a partial stay.

I. The government is likely to succeed on the merits as to the records bearing classification markings.

The district court erred in exercising jurisdiction as to the records bearing classification markings. Even if the exercise of jurisdiction were proper, there would be no basis for preventing the government from using its own records. And the court's

suggestion that there are "factual and legal disputes" about the records bearing classification markings, A7, is incorrect and not relevant in any event.

A. The district court erred by exercising jurisdiction as to records bearing classification markings.

1. "In order for an owner of property to invoke Rule 41(g), he must show that he had a possessory interest in the property seized by the government." *United States v. Howell*, 425 F.3d 971, 974 (11th Cir. 2005). The district court held that Plaintiff had standing because he had made "a colorable showing of a right to possess at least some of the seized property." A26. But "plaintiffs must demonstrate standing for each claim that they press and for each form of relief that they seek." *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2208 (2021). Plaintiff lacks standing at least as to the discrete set of records with classification markings because those records are government property, over which the Executive Branch has exclusive control and in which Plaintiff has no property interest. *See* 44 U.S.C. § 2202; Exec. Order 13,526, § 1.1(2); *see also Dep't of Navy v. Egan*, 484 U.S. 518, 527 (1988).

2. Likewise, the district court's exercise of equitable jurisdiction regarding an ongoing criminal investigation—which is reserved for "exceptional" circumstances, *Hunsucker*, 497 F.2d at 32—cannot extend to these records. Under *Richey*, four factors guide the exercise of that jurisdiction: (1) whether the government has "displayed 'a callous disregard for the constitutional rights'" of the search's subject; (2) "whether the plaintiff has an individual interest in and need for the material"; (3) "whether the

plaintiff would be irreparably injured by denial of the return of the property"; and (4) "whether the plaintiff has an adequate remedy at law." 515 F.2d at 1243-44 (citation omitted). None of those factors favors exercising jurisdiction as to the records with classification markings.

On the "[f]irst, and perhaps foremost" factor, *id.* at 1243, the district court correctly found that Plaintiff has not shown any violation of his rights. A22. The remaining factors apply only to "material whose return [plaintiff] seeks" and to injury resulting from "denial of the return of the property." *Richey*, 515 F.2d at 1243. Plaintiff has no right to the "return" of records with classification markings, which are not his property. *Id.* The district court reasoned that other materials in which Plaintiff might have a cognizable interest cannot readily be separated from those in which he does not. A22. But that rationale is inapplicable to records with classification markings, which are easily identifiable and already segregated from the other seized materials. D.E. 48 at 13.

3. Plaintiff has observed that the PRA generally provides that presidential records from his tenure shall be "available" to him. 44 U.S.C. § 2205(3). But a right to *access* records in NARA's custody does not support any claim for the *return* of records owned by the government. *Id.* § 2202. And Plaintiff is in any event poorly positioned to invoke the PRA in seeking extraordinary equitable relief because he failed to comply with his PRA obligation to deposit the records at issue with NARA in the first place.

B. The records bearing classification markings are not subject to any plausible claim of privilege that would prevent the government from reviewing and using them.

The district court restrained the government's review and use of seized materials to allow the special master to consider claims for return of personal property and assertions of attorney-client or executive privilege. None of those rationales applies to the records bearing classification markings: The markings establish on the face of the documents that they are not Plaintiff's personal property, and neither Plaintiff nor the court has suggested that they might be subject to attorney-client privilege. Plaintiff has never even attempted to make or substantiate any assertion of executive privilege. Even if he did, no such assertion could justify restricting the Executive Branch's review and use of these records for multiple independent reasons.

1. Executive privilege exists "not for the benefit of the President as an individual, but for the benefit of the Republic." *Nixon v. Administrator of General Servs.*, 433 U.S. 425, 449 (1977) (*GSA*). Consistent with the privilege's function of protecting the confidentiality of Executive Branch communications, it may be invoked to prevent the sharing of materials *outside* the Executive Branch. *Cf. Trump v. Thompson*, 142 S. Ct. 680, 680 (2022) (per curiam). But neither Plaintiff nor the district court cited any case in which executive privilege has been successfully invoked to prohibit the sharing of documents within the Executive Branch itself.

To the contrary, in what appears to be the only case in which such an assertion was made, the Supreme Court rejected former President Nixon's claim that a statute

requiring the GSA to review documents and recordings created during his presidency violated executive privilege. *GSA*, 433 U.S. at 446-55. The Court emphasized that the former President was attempting to assert "a privilege against the very Executive Branch in whose name the privilege is invoked." *Id.* at 447-48. And the Court "readily" rejected that assertion because the review at issue was "a very limited intrusion by personnel in the Executive Branch sensitive to executive concerns." *Id.* at 451.

This case similarly involves potential assertions of executive privilege by a former President against "the very Executive Branch in whose name the privilege is invoked." *Id.* at 447-48. Here, too, review and use of the records in a criminal investigation is a "limited intrusion by personnel in the Executive Branch sensitive to executive concerns." *Id.* at 451. And an executive privilege claim would be especially implausible as to records like those at issue here because the Constitution vests the incumbent President, as "head of the Executive Branch and as Commander in Chief," with the authority "to classify and control access to information bearing on national security." *Egan*, 484 U.S. at 527. Accordingly, even if an assertion of privilege might justify withholding the records at issue from Congress or the public, there would be no basis for withholding them from the Executive Branch itself.

2. Even if a former President could assert executive privilege against the Executive Branch's review and use of its own documents, any such assertion would inevitably fail as to the records bearing classification markings. Executive privilege is qualified, not absolute. In *United States v. Nixon*, the Supreme Court emphasized that

privilege claims "must be considered in light of our historic commitment to the rule of law." 418 U.S. at 708. The Court thus held that executive privilege "must yield to the demonstrated, specific need for evidence in a pending criminal trial." *Id.* at 713; *see also In re Sealed Case*, 121 F.3d 729, 754-56 (D.C. Cir. 1997) (applying *United States v. Nixon* in the context of a grand-jury subpoena). This case does not involve a pending trial, but the need for the records bearing classification markings is even more clearly "demonstrated" and "specific": The government is investigating potential violations of 18 U.S.C. § 793(e), which prohibits unauthorized retention of national defense information. The records here are not merely relevant evidence; they are the very objects of the offense. Similarly, the government's investigation of potential violations of 18 U.S.C. § 1519, prohibiting obstruction of justice, requires assessing the adequacy of the response to a grand-jury subpoena for all documents in Plaintiff's possession "bearing classification markings." A48. Again, the records at issue are central to that investigation.

Even more clearly than in *United States v. Nixon*, there is no risk that the government's review of the seized records would chill communications by future presidential advisors. *See* 418 U.S. at 712 (presidential advisors would not "be moved to temper the candor of their remarks by the infrequent occasions of disclosure" for a "criminal prosecution"). Just the opposite: The government seeks to ensure compliance with laws protecting the confidentiality and proper treatment of sensitive government

records—a process that should enhance, rather than undermine, the candor of future presidential communications.

3. Finally, Plaintiff declined to assert executive privilege when his custodian was served with a grand-jury subpoena seeking "[a]ny and all documents or writings" in his custody "bearing classification markings." A48. Instead, Plaintiff's counsel produced a set of classified records to the government, and Plaintiff's custodian certified that "[a]ny and all responsive documents" had been produced after a "diligent search." A50. Now that the government has discovered more than 100 additional responsive records, Plaintiff cannot claim that those records are shielded from review by a privilege that he failed to assert at the appropriate time.

C. No factual or legal disputes justify the district court's order as to the records bearing classification markings.

The district court did not identify any basis on which Plaintiff might successfully assert executive privilege—or any other legal ground—to prevent the government from reviewing the records bearing classification markings. Instead, it stated that the special-master process is needed to resolve "disputes as to the proper designation of the seized materials." A7-A8. That is doubly mistaken.

1. Plaintiff has never disputed that the government's search recovered records bearing classification markings. *See* A115-A121. Instead, the district court cited portions of Plaintiff's filings in which he suggested that he *could have* declassified those documents or purported to designate them as "personal" records under the PRA before

leaving office. A7-A8. But despite multiple opportunities, Plaintiff has never represented that he *in fact* took either of those steps—much less supported such a representation with competent evidence. The court erred in granting extraordinary relief based on unsubstantiated possibilities.

2. In any event, even if Plaintiff had asserted in court that he declassified the records, the government would still need to review the records to assess that claim, and they would still have been responsive to the grand-jury subpoena for all records "bearing classification markings." A48. Any assertion of executive privilege would thus plainly be overcome under *United States v. Nixon* because the government would still need to assess the records in investigating possible violations of Sections 793(e) and 1519. And if the records had actually been declassified, the government would have an additional compelling need to understand what had been declassified and why (and who has seen it) to protect intelligence sources and methods.

Similarly, Plaintiff only weakens his case by suggesting that he might have purported to categorize these records as "personal" records under the PRA. Such a categorization would be flatly inconsistent with the statute, which defines "personal records" as those "of a purely private or nonpublic character which do not relate to" the President's official duties. 44 U.S.C. § 2201(3). And if Plaintiff truly means to assert—implausibly—that records containing sensitive national-security information fit that description, he cannot maintain that the same records are protected by executive

privilege—*i.e.*, that they are "Presidential communications" made in furtherance of the "performance of" his official "duties." *United States v. Nixon*, 418 U.S. at 705.

II. Absent a partial stay, the government and the public will be irreparably harmed.

The district court's order irreparably harms the government and the public by (A) interfering with the government's response to the national-security risks arising from the mishandling and possible disclosure of records bearing classification markings; (B) impairing a criminal investigation into these critical national-security matters; and (C) forcing the government to disclose highly sensitive materials as part of the special-master review.

A. By enjoining the review and use of the records bearing classification markings for criminal-investigative purposes, the district court's order impedes the government's efforts to protect the Nation's security. As explained by the Assistant Director who oversees the FBI's Counterintelligence Division, the Bureau's national-security and law-enforcement missions cannot be bifurcated without impairing its work. A38-A43. Since the 9/11 attacks, the FBI has integrated its intelligence and law-enforcement functions when it pursues its national-security mission. A41. The FBI's investigation into mishandling of classified information is thus "an exercise both of the FBI's criminal investigation authority and of the FBI's authority to investigate threats to the national security." *Attorney General's Guidelines for Domestic FBI Operations* 6 (2008),

https://www.justice.gov/archive/opa/docs/guidelines.pdf. Enjoining criminal investigative activity in this area thus inevitably harms national security.

The district court specified that its order should not interfere with the IC's "classification review and/or intelligence assessment," A14, and later clarified that "to the extent that such intelligence review becomes truly and necessarily inseparable from criminal investigative efforts," the order "does not enjoin the Government from proceeding with its Security Assessments," A9. But that is not sufficient. The IC's review and assessment seek to evaluate the harm *that would* result from disclosure of the seized records. A40-A41. The court's injunction restricts the FBI—which has lead responsibility for investigating such matters in the United States—from using the seized records in its criminal-investigative tools to assess which if any records *were in fact disclosed*, to whom, and in what circumstances.

For example, the court's injunction bars the government from "using the content of the documents to conduct witness interviews." A9. The injunction also appears to bar the FBI and DOJ from further reviewing the records to discern any patterns in the types of records that were retained, which could lead to identification of other records still missing. *See* A42 (describing recovery of "empty folders with 'classified' banners"). And the injunction would prohibit the government from using any aspect of the seized records' contents to support the use of compulsory process to locate any additional records.

Disregarding a sworn declaration from a senior FBI official, the court dismissed such concerns as "hypothetical scenarios" and faulted the government for not identifying an "emergency" or "imminent disclosure of classified information." A11. But the record makes clear that the materials were stored in an unsecure manner over a prolonged period, and the court's injunction itself prevents the government from even beginning to take necessary steps to determine whether improper disclosures might have occurred or may still occur.

Furthermore, although the court purported to leave the IC's review and assessment undisturbed, those reviews involve DOJ and FBI personnel and are closely tied to the ongoing criminal investigation. A40-A42. The court offered little guidance on how FBI and DOJ personnel should bifurcate their efforts, forcing them to discern that line for themselves on pain of contempt should the court later disagree with their judgments—a threat that will inevitably chill their legitimate activities.

B. The injunction also unduly interferes with the criminal investigation. It prohibits the government from accessing the seized records to evaluate whether charges are appropriate and even from "bringing charges based on" those records. A9. "The notion that a district court could have *any* input on a United States Attorney's investigation and decision whether to ... bring a case" is "entirely incompatible with the constitutional assignment to the Executive Branch of exclusive power over prosecutorial decisions." *In re Wild*, 994 F.3d 1244, 1287 (11th Cir. 2021) (Tjoflat, J., concurring).

Moreover, the public has an "interest in the fair and expeditious administration of the criminal laws." *United States v. Dionisio*, 410 U.S. 1, 17 (1973); *see Cobbledick v. United States*, 309 U.S. 323, 325 (1940) ("[E]ncouragement of delay is fatal to the vindication of the criminal law."). The government's need to proceed apace is heightened where, as here, it has reason to believe that obstructive acts may impede its investigation. *See* A108-09 (finding of probable cause for violations of 18 U.S.C. § 1519 and discussing risks of "obstruction of justice"). And the prohibition on review and use of records bearing classification markings is uniquely harmful here, where the criminal investigation concerns retention and handling of *those very records*.

C. Finally, requiring disclosure of classified records to a special master and to Plaintiff's counsel, *see* D.E. 91 at 4, would impose irreparable harm on the government and public. The Supreme Court has emphasized that courts should be cautious before "insisting upon an examination" of records whose disclosure would jeopardize national security "even by the judge alone, in chambers." *United States v. Reynolds*, 345 U.S. 1, 10 (1952). In criminal proceedings, courts have routinely rejected arguments that cleared defense counsel are entitled to classified information without the requisite "need to know"—even after a prosecution has commenced. *See, e.g.*, *United States v. Daoud*, 755 F.3d 479, 483-85 (7th Cir. 2014) (reversing order requiring disclosure); *United States v. Asgari*, 940 F.3d 188, 191 (6th Cir. 2019) (similar). Indeed, in the Classified Information Procedures Act (CIPA), 18 U.S.C. App. III, which governs criminal proceedings, Congress aimed "to protect classified information from unnecessary disclosure at any

stage of a criminal trial," *United States v. O'Hara,* 301 F.3d 563, 568 (7th Cir. 2002), including by permitting the government to move the court *ex parte* to withhold classified information from the defense, *see* 18 U.S.C. App. III § 4; *United States v. Campa*, 529 F.3d 980, 994-96 (11th Cir. 2008). Yet the district court here ordered disclosure of highly sensitive material to a special master and to Plaintiff's counsel—potentially including witnesses to relevant events—in the midst of an investigation, where no charges have been brought. Because that review serves no possible value, there is no basis for disclosing such sensitive information.

III. A partial stay would impose no cognizable harm on Plaintiff.

Allowing the government to use and review the records bearing classification markings for criminal-investigative purposes would not cause any cognizable injury to Plaintiff. Plaintiff has no property or other legal interest in those records. None of the potential harms to Plaintiff identified by the district court, *cf.* A34, are applicable to those records. Criminal investigators have already conducted an initial review of the records, A19, and the court allowed other government officials to continue to review and use them for national-security purposes. Plaintiff has identified no cognizable harm from merely allowing criminal investigators to continue to review and use this same subset of the seized records.

Plaintiff's only possible "injury" is the government's investigation, but that injury is not legally cognizable. "[T]he cost, anxiety, and inconvenience of having to defend against" potential criminal prosecution cannot "by themselves be considered

'irreparable' in the special legal sense of that term." *Younger v. Harris*, 401 U.S. 37, 46 (1971). That is why courts have exercised great caution before interfering through civil actions with criminal investigations or cases. *See id.*; *see also, e.g.*, *Deaver v. Seymour*, 822 F.2d 66, 69-71 (D.C. Cir. 1987); *Ramsden v. United States*, 2 F.3d 322, 326 (9th Cir. 1993). The district court erred by departing from that fundamental principle of judicial restraint.

CONCLUSION

The district court's order should be stayed to the extent it (1) enjoins the further review and use for criminal-investigative purposes of the seized records bearing classification markings and (2) requires the government to disclose those records for a special-master review process.

Respectfully submitted,

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Dated: September 16, 2022

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 27(d)(2)(A) because it contains 5,197 words. This brief also complies with the typeface and type-style requirements of Federal Rules of Appellate Procedure 27(d)(1)(E) and 32(a)(5)-(6)because it was prepared using Microsoft Word in Garamond 14-point font, a proportionally spaced typeface.

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United States Attorney

CERTIFICATE OF SERVICE

I hereby certify that on September 16, 2022, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system. Plaintiffs' counsel was also notified of this motion by email.

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Juan Antonio Gonzalez
United States Attorney

ADDENDUM

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
WEST PALM BEACH DIVISION

CASE NO. 22-CV-81294-CANNON

DONALD J. TRUMP,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.
_____/

NOTICE OF APPEAL

Notice is hereby given that the United States of America, Defendant in the above-captioned matter, appeals to the United States Court of Appeals for the Eleventh Circuit from the order of the district court entered on September 5, 2022, Docket Entry 64.

Date: September 8, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on September 8, 2022, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record via transmission of Notices of Electronic Filing generated by CM/ECF.

s/Juan Antonio Gonzalez
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United States Attorney

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
WEST PALM BEACH DIVISION

CASE NO. 22-81294-CIV-CANNON

DONALD J. TRUMP,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.
_____/

ORDER DENYING MOTION FOR PARTIAL STAY PENDING APPEAL

THIS CAUSE comes before the Court upon the Government's Motion for Partial Stay Pending Appeal (the "Motion") [ECF No. 69], filed on September 8, 2022. The Court has reviewed the Motion, the Response in Opposition [ECF No. 84], the Reply [ECF No. 88], and the full record. For the reasons discussed below, the Government's Motion [ECF No. 69] is **DENIED**. Further, by separate order, and by agreement of the parties as a matter of selection [ECF Nos. 83, 86], the Honorable Raymond J. Dearie, Senior United States District Judge for the Eastern District of New York, is hereby appointed to serve as Special Master in this case. As further described in that order, the Special Master is directed to prioritize review of the documents at issue in the Motion and to issue interim reports and recommendations as appropriate.

RELEVANT BACKGROUND

Plaintiff Donald J. Trump initiated this action on August 22, 2022, seeking various forms of relief in connection with the search warrant executed on his residence on August 8, 2022 [ECF No. 1]. The Court held a hearing on Plaintiff's requests on September 1, 2022 [ECF No. 62]. Thereafter, pursuant to its equitable jurisdiction and inherent supervisory authority, and in light of the extraordinary circumstances presented, the Court granted Plaintiff's request for the

appointment of a special master and temporarily enjoined the Government from further review and use of the seized materials for criminal investigative purposes only (the "September 5 Order") [ECF No. 64]. The September 5 Order allows the Government to "continue to review and use the materials seized for purposes of intelligence classification and national security assessments" (the "Security Assessments") [ECF No. 64 p. 24].

On September 8, 2022, the Government filed a notice of appeal [ECF No. 68] followed by the instant Motion [ECF No. 69].[1] The Motion requests a stay of the September 5 Order to the extent it "(1) enjoins the further review and use for criminal investigative purposes of records bearing classification markings that were recovered pursuant to a court-authorized search warrant and (2) requires the government to disclose those classified records to a special master for review" [ECF No. 69 p. 1]. The Motion is accompanied by the Declaration of Alan E. Kohler, Jr., Assistant Director of the Counterintelligence Division of the Federal Bureau of Investigation (the "Kohler Declaration") [ECF No. 69-1]. The Kohler Declaration states that the Government's Security Assessments are "inextricably linked" to the Government's criminal investigation, and that it would be "exceedingly difficult" to bifurcate the personnel involved [ECF No. 69-1 pp. 3–4]. On September 12, 2022, Plaintiff filed a response in opposition to the Motion [ECF No. 84], and on September 13, 2022, the Government filed a reply [ECF No. 88].

The Government advises in the Motion that it will seek relief from the United States Court of Appeals for the Eleventh Circuit "[i]f the Court does not grant a stay by Thursday, September 15" [ECF No. 69 p. 1]. Appreciative of the urgency of this matter, the Court hereby issues this Order on an expedited basis.

[1] The Government's appeal has been docketed as 11th Cir. No. 22-13005.

LEGAL STANDARD

In considering a motion to stay pending appeal, district courts must consider "(1) whether the stay applicant has made a strong showing that it is likely to succeed on the merits, (2) whether the applicant will be irreparably injured absent a stay, (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding, and (4) where the public interest lies." *Democratic Exec. Comm. of Fla. v. Lee*, 915 F.3d 1312, 1317 (11th Cir. 2019) (citing *Nken v. Holder*, 556 U.S. 418, 434 (2009)). "The first two factors of [this] standard are the most critical," and "[t]he party requesting a stay bears the burden of showing that the circumstances justify an exercise of [judicial discretion to stay an injunction]." *Nken*, 556 U.S. at 433–34.

DISCUSSION

The Motion primarily seeks a stay of the September 5 Order insofar as it temporarily enjoins, in conjunction with the Special Master's review of the seized materials, approximately 100 documents "marked as classified (and papers physically attached to them)" [ECF No. 69 p. 2 n.1]. In isolating the described documents from the larger set of seized materials, the Motion effectively asks the Court to accept the following compound premises, neither of which the Court is prepared to adopt hastily without further review by a Special Master. The first premise underlying the Motion is that all of the approximately 100 documents isolated by the Government (and "papers physically attached to them") are classified government records, and that Plaintiff therefore could not possibly have a possessory interest in any of them. The second is that Plaintiff has no plausible claim of privilege as to any of these documents [ECF No. 69 p. 7 (categorically asserting that the "classified records at issue in this Motion . . . do not include personal records or potentially privileged communications")]. The Court does not find it appropriate to accept the

Government's conclusions on these important and disputed issues without further review by a neutral third party in an expedited and orderly fashion.

To further expand the point, and as more fully explained in the September 5 Order, the Government seized a high volume of materials from Plaintiff's residence on August 8, 2022 [ECF No. 64 p. 4]; some of those materials undisputedly constitute personal property and/or privileged materials [ECF No. 64 p. 13]; the record suggests ongoing factual and legal disputes as to precisely which materials constitute personal property and/or privileged materials [ECF No. 64 p. 14]; and there are documented instances giving rise to concerns about the Government's ability to properly categorize and screen materials [ECF No. 64 p. 15]. Furthermore, although the Government emphasizes what it perceives to be Plaintiff's insufficiently particularized showing on various document-specific assertions [ECF No. 69 p. 11; ECF No. 88 pp. 3–7], it remains the case that Plaintiff has not had a meaningful ability to concretize his position with respect to the seized materials given (1) the ex parte nature of the approved filter protocol, (2) the relatively generalized nature of the Government's "Detailed Property Inventory" [ECF No. 39-1], and (3) Plaintiff's unsuccessful efforts, pre-suit, to gather more information from the Government about the content of the seized materials [ECF No. 1 pp. 3, 8–9 (describing Plaintiff's rejected requests to obtain a list of exactly what was taken and from where, to inspect the seized property, and to obtain information regarding potentially privileged documents)].[2]

In many respects, the Government's position thus presupposes the content, designation, and associated interests in materials under its control—yet, as the parties' competing filings reveal, there are disputes as to the proper designation of the seized materials, the legal implications

[2] *See In re Search Warrant Issued June 13, 2019*, 942 F.3d 159, 178–79 (4th Cir. 2019), *as amended* (Oct. 31, 2019) (referencing sensible benefits, in certain circumstances, of adversarial, pre-review proceedings on filter protocols).

flowing from those designations, and the intersecting bodies of law permeating those designations [*see* ECF No. 69 pp. 5, 8–12; ECF No. 84 pp. 11–15; ECF No. 88 pp. 3–7]. Under these circumstances, the Court declines to conduct a subset-by-subset, piecemeal analysis of the seized property, based entirely on the Government's representations about what is contained in a select portion of the property. *See United States v. Melquiades*, 394 F. App'x 578, 584 (11th Cir. 2010) (explaining that, to have standing to bring a Rule 41(g) action, a movant must allege "a colorable ownership, possessory or security interest in at least a portion of the [seized] property" (quoting *United States v. Rodriguez-Aguirre*, 264 F.3d 1195, 1204 (10th Cir. 2001)). Indeed, if the Court were willing to accept the Government's representations that select portions of the seized materials are—without exception—government property not subject to any privileges, and did not think a special master would serve a meaningful purpose, the Court would have denied Plaintiff's special master request [*see* ECF No. 48 p. 3 (arguing that the "appointment of a special master is unnecessary" because the Government had already reviewed the materials and identified personal items and potentially privileged materials)].

Therefore, upon consideration of the full range of seized materials as described in the Government's submissions, and for the reasons explained in the September 5 Order and supplemented in part below, the Court does not find the requested partial stay to be warranted under the circumstances. The Court offers the following limited analysis on three additional areas, mindful of the Government's request for an expedited ruling.

I. The September 5 Order

First, accounting for the concerns raised in the Government's submissions [ECF No. 69 p. 17; ECF No. 88 p. 8], the Court finds that further elaboration on the September 5 Order is warranted. The September 5 Order temporarily enjoins the Government—as a component of the

special master process—only from further use of the content of the seized materials for criminal investigative purposes pending resolution of the Special Master's recommendations. This includes, for example, presenting the seized materials to a grand jury and using the content of the documents to conduct witness interviews as part of a criminal investigation. The September 5 Order does not restrict the Government from conducting investigations or bringing charges based on anything other than the actual content of the seized materials; from questioning witnesses and obtaining other information about the movement and storage of seized materials, including documents marked as classified, without discussion of their contents [ECF No. 69 p. 17]; from briefing "Congressional leaders with intelligence oversight responsibilities" on the seized materials [ECF No. 69 p. 17 n.5]; from reviewing the seized materials to conduct the Security Assessments; or from involving the FBI in the foregoing actions.[3] Moreover, as indicated in the September 5 Order, the temporary restraint does not prevent the Government from continuing "to review and use the materials seized for purposes of intelligence classification and national security assessments" [ECF No. 64 p. 24]. Hence, as Plaintiff acknowledges, to the extent that such intelligence review becomes truly and necessarily inseparable from criminal investigative efforts concerning the content of the seized materials, the September 5 Order does not enjoin the Government from proceeding with its Security Assessments [ECF No. 84 p. 16; ECF No. 39 pp. 2–3].

Again, the September 5 Order imposes a temporary restraint on certain review and use of the seized materials, in natural conjunction with the special master process, only for the period of

[3] Separately, the Court also clarifies a scrivener's error: the "January 2021" reference on page 2 of the September 5 Order should read "January 2022" [*see* ECF No. 64 p. 2 ("In January [2022], as a product of those conversations, Plaintiff transferred fifteen boxes (the "Fifteen Boxes") from his personal residence to NARA [ECF No. 1 pp. 4–5; ECF No. 48 p. 5; ECF No. 48-1 p. 6].")]. That typographical error did not affect the Court's analysis.

time required to resolve any categorization disputes and rule on Plaintiff's Rule 41(g) requests. This restriction is not out of step with the logical approach approved and used for special master review in other cases, often with the consent of the government, and it is warranted here to reinforce the value of the Special Master, to protect against unwarranted disclosure and use of potentially privileged and personal material pending completion of the review process, and to ensure public trust.[4]

II. Irreparable Injury

The Court is not persuaded that the Government will suffer an irreparable injury without the requested stay. With respect to the temporary enjoinment on criminal investigative use, the Government's main argument is that such use is "inextricably intertwined" with its Security Assessments and therefore the enjoinment at issue necessarily poses a risk to national security interests [ECF No. 69 pp. 3, 12–17]. Mindful of the traditional "reluctan[ce] to intrude upon the

[4] In general, when courts appoint a special master to review seized materials for potential claims of privilege, the government naturally (and often voluntarily) is temporarily prevented from further review and use of the subject materials. *See, e.g.*, *United States v. Abbell*, 914 F. Supp. 519, 521 (S.D. Fla. 1995) (appointing special master to review seized materials after government's taint team had completed a privilege review of some of the seized materials, and enjoining government from further examining seized materials until the court approved the "recommendations made by the Special Master as to the responsiveness and privilege issues"); *United States v. Stewart*, No. 02-CR-395, 2002 WL 1300059, at *10 (S.D.N.Y. June 11, 2002) (requiring government to place seized materials under seal and not review them until special master completed his review); *United States v. Gallego*, No. CR-18-01537-001, 2018 WL 4257967, at *3–4 (D. Ariz. Sept. 6, 2018) (same). *Cf. United States v. Ritchey*, No. 21-CR-6, 2022 WL 3023551, at *9 (S.D. Miss. June 3, 2022) (enjoining government's prosecution team from further review and use of seized materials until court approved a new filter review process to verify the filter review team's initial screening process); *In re Search Warrant dated November 5, 2021*, No. 21-MC-00813-AT, ECF No. 5 (S.D.N.Y. Nov. 12, 2021) (indicating that government voluntarily paused its "extraction and review" of seized contents pending consideration and appointment of special master); *In the Matter of Search Warrants Executed on April 9, 2018*, No. 18-MJ-03161-KMW, ECF No. 16 (S.D.N.Y. Apr. 9, 2018) (same); *In the Matter of Search Warrants Executed on April 28, 2021*, No. 21-00425-MC-JPO, ECF No. 1 p. 2 (S.D.N.Y. May 4, 2021) (noting that government voluntarily did not begin review of seized materials pending consideration and appointment of special master).

authority of the Executive in military and national security affairs," *Department of Navy v. Egan*, 484 U.S. 518, 530 (1988), the Court nonetheless cannot abdicate its control over questions of privilege and does not find the Government's argument sufficiently convincing as presented. First, there has been no actual suggestion by the Government of any identifiable emergency or imminent disclosure of classified information arising from Plaintiff's allegedly unlawful retention of the seized property. Instead, and unfortunately, the unwarranted disclosures that float in the background have been leaks to the media *after* the underlying seizure [*see* ECF No. 64 pp. 9–11 n.11]. Second, although it might be easier, in the immediate future, for the Government's criminal investigative work to proceed in tandem with the Security Assessments, the Government's submissions on the subject do not establish that pausing the criminal investigative review pending completion of the Special Master's work actually will impede the intelligence community's ability to assess "the potential risk to national security that would result from disclosure of the seized materials" [ECF No. 39 pp. 2–3]. The Kohler Declaration, for example, states that it would be "exceedingly difficult" to bifurcate the personnel involved in the described processes, and then it proceeds to posit hypothetical conflicts that could arise if the Security Assessments require criminal investigative efforts [ECF No. 69-1 ¶ 9; *see also* ECF No. 88 p. 9 (explaining that continued enjoinment of use and review of the seized materials for criminal investigative purposes would cause the intelligence community to "(at best) be limited in its ability to address and fully mitigate any national security risks presented")]. The Government's submissions, read collectively, do not firmly maintain that the described processes are inextricably intertwined, and instead rely heavily on hypothetical scenarios and generalized explanations that do not establish irreparable injury. Third, as noted above, to the extent that the Security Assessments truly are, in fact, inextricable from criminal investigative use of the seized materials, the Court makes clear

that the September 5 Order does not enjoin the Government from taking actions necessary for the Security Assessments.[5] And finally, in light of the Government's stated concerns, the Court will direct the Special Master to prioritize review of the approximately 100 documents marked as classified (and papers physically attached thereto), and thereafter consider prompt adjustments to the Court's Orders as necessary.

The Government also presents the argument, in passing, that making the full scope of the seized materials available to the Special Master would itself create irreparable harm [ECF No. 69 p. 18]. Insofar as the Government argues that disclosure to a Special Master of documents marked as classified necessarily creates an irreparable injury because the special master process in this case is unnecessary, the Court disagrees for the reasons previously stated. Separately, to the extent the Government appears to suggest that it would suffer independent irreparable harm from review of the documents by the Court's designee with appropriate clearances and controlled access, that argument is meritless.

III. Relevant Principles

Lastly, the Court agrees with the Government that "the public is best served by evenhanded adherence to established principles of civil and criminal procedure," regardless of the personal identity of the parties involved [ECF No. 88 p. 10]. It is also true, of course, that evenhanded procedure does not demand unquestioning trust in the determinations of the Department of Justice. Based on the nature of this action, the principles of equity require the Court to consider the specific

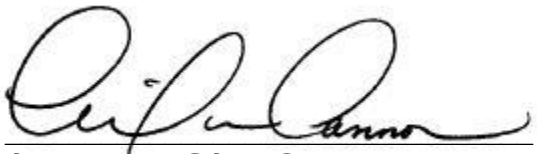
[5] Needless to say, the Court is confident that the Government will faithfully adhere to a proper understanding of the term "inextricable" and, where possible, minimize the use and disclosure of the seized materials in accordance with the Court's orders. Because the Court is not privy to the specific details of the Government's investigative efforts and national security review, the Court expects that the Government, in general, is best suited to assess whether contemplated actions are consistent with the standard described herein.

context at issue, and that consideration is inherently impacted by the position formerly held by Plaintiff. The Court thus continues to endeavor to serve the public interest, the principles of civil and criminal procedure, and the principles of equity. And the Court remains firmly of the view that appointment of a special master to conduct a review of the seized materials, accompanied by a temporary injunction to avoid unwarranted use and disclosure of potentially privileged and/or personal materials, is fully consonant with the foregoing principles and with the need to ensure at least the appearance of fairness and integrity under unprecedented circumstances.

CONCLUSION

Accordingly, it is hereby **ORDERED AND ADJUDGED** that the Motion for Partial Stay Pending Appeal [ECF No. 69] is **DENIED**.

DONE AND ORDERED in Chambers at Fort Pierce, Florida this 15th day of September 2022.



AILEEN M. CANNON
UNITED STATES DISTRICT JUDGE

cc: counsel of record

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
WEST PALM BEACH DIVISION

CASE NO. 22-81294-CIV-CANNON

DONALD J. TRUMP,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.
_____/

ORDER

THIS CAUSE comes before the Court upon Plaintiff's Motion for Judicial Oversight and Additional Relief (the "Motion") [ECF No. 1], filed on August 22, 2022. The Court has reviewed the Motion, Plaintiff's Supplemental Filing [ECF No. 28], the Government's Response in Opposition [ECF No. 48], Plaintiff's Reply [ECF No. 58], and the related filings [ECF Nos. 31, 39, 40 (sealed)]. The Court also held a hearing on the Motion on September 1, 2022.

Pursuant to the Court's equitable jurisdiction and inherent supervisory authority, and mindful of the need to ensure at least the appearance of fairness and integrity under the extraordinary circumstances presented, Plaintiff's Motion [ECF No. 1] is **GRANTED IN PART**. The Court hereby authorizes the appointment of a special master to review the seized property for personal items and documents and potentially privileged material subject to claims of attorney-client and/or executive privilege. Furthermore, in natural conjunction with that appointment, and consistent with the value and sequence of special master procedures, the Court also temporarily enjoins the Government from reviewing and using the seized materials for investigative purposes pending completion of the special master's review or further Court order. This Order shall not impede the classification review and/or intelligence assessment by the Office of the Director of

National Intelligence ("ODNI") as described in the Government's Notice of Receipt of Preliminary Order [ECF No. 31 p. 2].

RELEVANT BACKGROUND

The following is a summary of the record based on the parties' submissions and oral presentation.[1] Throughout 2021, former President Donald J. Trump ("Plaintiff") and the National Archives and Records Administration ("NARA") were engaged in conversations concerning records from Plaintiff's time in office [ECF No. 1 p. 4; ECF No. 48-1 p. 2].[2] In January 2021, as a product of those conversations, Plaintiff transferred fifteen boxes (the "Fifteen Boxes") from his personal residence to NARA [ECF No. 1 pp. 4–5; ECF No. 48 p. 5; ECF No. 48-1 p. 6]. Upon initial review of the Fifteen Boxes, NARA identified the items contained therein as newspapers, magazines, printed news articles, photos, miscellaneous printouts, notes, presidential correspondence, personal records, post-presidential records, and classified records [ECF No. 48 p. 5]. NARA subsequently informed the Department of Justice ("DOJ") of the contents of the boxes, claiming that some items contained markings of "classified national security information" [ECF No. 48 p. 5].

On April 12, 2022, NARA notified Plaintiff that it intended to provide the Fifteen Boxes to the Federal Bureau of Investigation ("FBI") the following week [ECF No. 48 p. 5]. Plaintiff then requested an extension on the contemplated delivery so that he could determine the existence of any privileged material [ECF No. 48-1 p. 7]. The White House Counsel's Office granted the request [ECF No. 48-1 p. 7]. On May 10, 2022, NARA informed Plaintiff that it would proceed

[1] Neither party requested an evidentiary hearing on the Motion, and under the circumstances, the Court finds resolution of the Motion sufficient and prudent on the present record.

[2] NARA is an independent federal agency within the Executive Branch that is responsible for the preservation and documentation of government and historical records.

with "provid[ing] the FBI access to the records in question, as requested by the incumbent President, beginning as early as Thursday, May 12, 2022" [ECF No. 48-1 p. 9]. The Government's filing states that the FBI did not obtain access to the Fifteen Boxes until approximately May 18, 2022 [ECF No. 48 p. 7].

On May 11, 2022, during the period of ongoing communications between Plaintiff and NARA, and before DOJ received the Fifteen Boxes, DOJ "obtained a grand jury subpoena, for which Plaintiff's counsel accepted service" [ECF No. 48 pp. 7–8; *see* ECF No. 1 p. 5]. The subpoena was directed to the "Custodian of Records [for] [t]he Office of Donald J. Trump" and requested "[a]ny and all documents or writings in the custody or control of Donald J. Trump and/or the Office of Donald J. Trump bearing classification markings" [ECF No. 48-1 p. 11]. Plaintiff contacted DOJ on June 2, 2022, and requested that FBI agents visit his residence the following day to pick up responsive documents [ECF No. 1 p. 5; ECF No. 48 p. 8]. Upon the FBI's arrival, Plaintiff's team handed over documents and permitted the three FBI agents and an accompanying DOJ attorney to visit the storage room where the documents were held [ECF No. 1 pp. 5–6; ECF No. 48 p. 9].

The Government contends that, after further investigation, "the FBI uncovered multiple sources of evidence indicating that the response to the May 11 grand jury subpoena was incomplete," and that potentially classified documents remained at Plaintiff's residence [ECF No. 48 p. 10]. Based on this evidence and an affidavit that remains partially under seal, on August 5, 2022, the Government applied to a United States Magistrate Judge for a search and seizure warrant of Plaintiff's residence, citing Title 18, Sections 793, 1519, and 2701 of the United States Code. Finding probable cause for each offense, the Magistrate Judge authorized law enforcement to (1) search Plaintiff's office, "all storage rooms, and all other rooms or areas within

the premises used or available to be used by [Plaintiff] and his staff and in which boxes or documents could be stored," and (2) seize the following: "[a]ny physical documents with classification markings, along with any containers/boxes (including any other contents) in which such documents are located, as well as any other containers/boxes that are collectively stored or found together with the aforementioned documents and containers/boxes"; "[i]nformation, including communications in any form, regarding the retrieval, storage, or transmission of national defense information or classified material"; "[a]ny government and/or Presidential records created" during Plaintiff's presidency; or "[a]ny evidence of the knowing alteration, destruction, or concealment of any government and/or Presidential Records, or of any documents with classification markings." *USA v. Sealed Search Warrant*, No. 22-08332-MJ-BER-1, ECF No. 17 pp. 3–4 (S.D. Fla. Aug. 11, 2022).

On August 8, 2022, pursuant to the search warrant, the Government executed an unannounced search of Plaintiff's residence. As reflected in the "Detailed Property Inventory" submitted by the Government in this action, agents seized approximately 11,000 documents and 1,800 other items from the office and storage room [ECF No. 39-1].[3] The seized property is generally categorized on the inventory as twenty-seven boxes containing documents, with and without classification markings, along with photographs, other documents, and miscellaneous material [ECF No. 1 pp. 24–26].[4]

Shortly after the search of the residence, Plaintiff's counsel spoke with the Government and requested the following: a copy of the affidavit in support of the warrant; the Government's

[3] These figures are drawn collectively from the Government's Detailed Property Inventory [ECF No. 39-1].

[4] Based on the Detailed Property Inventory, of the approximately 11,000 documents seized, roughly 100 contain classification markings [ECF No. 39-1 pp. 2–8].

consent to the appointment of a special master "to protect the integrity of privileged documents"; a detailed list of what was taken from the residence and from where exactly; and an opportunity to inspect the seized property [ECF No. 1 pp. 8–9]. The Government denied those requests [ECF No. 1 p. 9].[5]

In the absence of any agreement between the parties, on August 22, 2022, Plaintiff filed the Motion for Judicial Oversight and Additional Relief, seeking (1) the appointment of a special master to oversee the review of seized materials regarding identification of personal property and privilege review; (2) the enjoinment of further review of the seized materials until a special master is appointed; (3) a more detailed receipt for property; and (4) the return of any items seized in excess of the search warrant [ECF No. 1 p. 21; ECF No. 28 p. 10].

Following receipt of the Motion, the Court ordered Plaintiff to elaborate on the basis for the Court's jurisdiction and the relief sought [ECF No. 10]. Plaintiff did so via a Supplement to the Motion on August 26, 2022 [ECF No. 28]. Consistent with Rule 53(b)(1) of the Federal Rules of Civil Procedure, the Court issued a preliminary order indicating its intent to appoint a special master [ECF No. 29]. Shortly thereafter, the Government appeared in this action and filed the Notice of Receipt of Preliminary Order [ECF No. 31]. Plaintiff executed service that same day [ECF No. 32]. The Government then filed under seal the Notice by Investigative Team of Status Review (the "Investigative Team Report") [ECF No. 39], attaching the "Detailed Property Inventory" as ordered by the Court [ECF No. 39-1]. The Investigative Team Report, now fully

[5] The exact date of that conversation is unclear, but all agree that the conversation took place soon after the search. Plaintiff references August 11, 2022, in the Motion, three days after the search (and eleven days prior to the filing of the Motion). The Government does not offer a different view in its Response or otherwise challenge the substance of the rejected requests. Counsel for the Government stated during the hearing that Plaintiff's request for a special master was rejected on August 9, 2022, the morning after the search.

unsealed, indicates that the Investigative Team has "reviewed the seized materials in furtherance of its ongoing investigation," and that "[t]he seized materials will continue to be used to further the government's investigation . . . as it takes further investigative steps, such as through additional witness interviews and grand jury practice" [ECF No. 39 p. 2]. While acknowledging that investigators have "already examined every item seized (other than materials that remain subject to the filter protocols)," the Government clarifies that "'review' of the seized materials is not a single investigative step but an ongoing process in this active criminal investigation" [ECF No. 39 p. 2]. The Government also states in its Investigative Team Report that DOJ and ODNI are "facilitating a classification review of materials recovered pursuant to the search warrant, and ODNI is leading an intelligence community assessment of the potential risk to national security that would result from disclosure of the seized materials" [ECF No. 39 pp. 2–3]. Additionally, the Government filed under seal its Notice of Status of Privilege Review Team's Filter Process and Production of Itemized List of Documents Within Privilege Review Team's Custody (the "Privilege Review Team's Report") [ECF No. 40 (sealed)]. The Privilege Review Team's Report remains under seal in accordance with the parties' joint request at the hearing. This Order refers to the content of that report in general terms.

On August 30, 2022, the Government filed the Response to Plaintiff's Motion [ECF No. 48], and on August 31, 2022, Plaintiff filed the Reply [ECF No. 58]. The Court then held a hearing on the Motion. This Order follows.

DISCUSSION

I. Jurisdiction

As previewed, Plaintiff initiated this action with a hybrid motion that seeks independent review of the property seized from his residence on August 8, 2022, a temporary injunction on any

further review by the Government in the meantime, and ultimately the return of the seized property under Rule 41(g) of the Federal Rules of Criminal Procedure.[6] Though somewhat convoluted, this filing is procedurally permissible[7] and creates an action in equity. *See Richey v. Smith*, 515 F.2d 1239, 1245 (5th Cir. 1975) ("[A] motion [for return of property] prior to [a] criminal proceeding[] . . . is more properly considered simply a suit in equity rather than one under the Rules of Criminal Procedure."); *In re Sealed Search Warrant & Application for a Warrant by Tel. or Other Reliable Elec. Means*, 11 F.4th 1235, 1245 n.6 (11th Cir. 2021) ("[Rule 41] is the proper way to come before the court to seek an injunction regarding the government's use of a filter team to review seized documents."). In other words, to entertain Plaintiff's requests, the Court first must decide to exercise its equitable jurisdiction, *see United States v. Martinez*, 241 F.3d 1329, 1330 (11th Cir. 2001), which "derives from the [Court's] inherent authority" over its officers (including attorneys) and processes, *see Hunsucker v. Phinney*, 497 F.2d 29, 32 (5th Cir. 1974); *Fayemi v. Hambrecht and Quist, Inc.*, 174 F.R.D. 319, 324 (S.D.N.Y. 1997).[8] In general, Rule 41(g) proceedings are

[6] Prior to 2002, what is now Rule 41(g) was codified as Rule 41(e). "[E]arlier cases interpreting Rule 41(e) also apply to the new Rule 41(g)." *United States v. Garza*, 486 F. App'x 782, 784 n.3 (11th Cir. 2012); *see De Almeida v. United States*, 459 F.3d 377, 380 n.2 (2d Cir. 2006).

[7] Rule 41(g) allows movants, prior to the return of an indictment, to initiate standalone actions "in the district where [their] property was seized." *See* Fed. R. Crim. P. 41(g); *United States v. Wilson*, 540 F.2d 1100, 1104 (D.C. Cir. 1976) ("Property which is seized . . . either by search warrant or subpoena may be ultimately disposed of by the court in that proceeding or in a subsequent civil action."); *In the Matter of John Bennett*, No. 12-61499-CIV-RSR, ECF No. 1 (S.D. Fla. July 31, 2012) (initiating an action with a "petition to return property"); *see also In re Grand Jury Investigation of Hugle*, 754 F.2d 863, 865 (9th Cir. 1985) ("[A] court is not required to defer relief [relating to privileged material] until after issuance of the indictment.").

[8] To the extent the Motion seeks relief totally distinct from the return of property itself, the Motion invokes the Court's inherent supervisory authority directly. *See generally Gravel v. United States*, 408 U.S. 606, 628 (1972); *In the Matter of Search Warrants Executed on April 28, 2021*, No. 21-00425-MC-JPO, ECF No. 1 (S.D.N.Y. May 4, 2021) (the government initiating a new action by requesting that the Court, pursuant to its supervisory authority, appoint a special master

"rooted in equitable principles" and served by "flexibility in procedural approach." *Smith v. Katzenbach*, 351 F.2d 810, 817 (D.C. Cir. 1965).

Importantly, equitable jurisdiction is reserved for "exceptional" circumstances, *see Hunsucker*, 497 F.2d at 32, and must be "exercised with caution and restraint," *Matter of Sixty-Seven Thousand Four Hundred Seventy Dollars ($67,470.00)*, 901 F.2d 1540, 1544 (11th Cir. 1990). Mindful of its limited power in this domain, the Court endeavors to fulfill its obligations under the law with due care.

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Upon full consideration of the parties' arguments and the exceptional circumstances presented, the Court deems the exercise of equitable jurisdiction over this action to be warranted. In making this determination, the Court relies in part on the factors identified in *Richey v. Smith*. 515 F.2d at 1245.[9] In that case, the former Fifth Circuit counseled courts to consider, for equitable jurisdiction purposes, whether the government displayed a callous disregard for the movant's constitutional rights, whether the movant has an individual interest in and need for the seized property, whether the movant would be irreparably injured by denial of the return of the seized property, and whether the movant otherwise has an adequate remedy at law. *Id.* (describing these factors as "some of the considerations" that should inform the decision of whether to exercise equitable jurisdiction); *see also Mesa Valderrama v. United States*, 417 F.3d 1189, 1197 (11th Cir.

to conduct filter review of materials potentially subject to attorney-client privilege and/or executive privilege).

[9] In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209–11 (11th Cir. 1981) (en banc), the Eleventh Circuit adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981.

2005) (characterizing the *Richey* factors as guiding considerations). Those factors, although mixed, ultimately counsel in favor of exercising jurisdiction.

With respect to the first factor, the Court agrees with the Government that, at least based on the record to date, there has not been a compelling showing of callous disregard for Plaintiff's constitutional rights. This factor cuts against the exercise of equitable jurisdiction.

The second factor—whether the movant has an individual interest in and need for the seized property—weighs in favor of entertaining Plaintiff's requests. According to the Privilege Review Team's Report, the seized materials include medical documents, correspondence related to taxes, and accounting information [ECF No. 40-2; *see also* ECF No. 48 p. 18 (conceding that Plaintiff "may have a property interest in his personal effects")]. The Government also has acknowledged that it seized some "[p]ersonal effects without evidentiary value" and, by its own estimation, upwards of 500 pages of material potentially subject to attorney-client privilege [ECF No. 48 p. 16; ECF No. 40 p. 2]. Thus, based on the volume and nature of the seized material, the Court is satisfied that Plaintiff has an interest in and need for at least a portion of it, even if the underlying subsidiary detail as to each item cannot reasonably be determined at this time based on the information provided by the Government to date.[10]

The same reasoning contributes to the Court's determination that the third factor—risk of irreparable injury—likewise supports the exercise of jurisdiction. In addition to being deprived of potentially significant personal documents, which alone creates a real harm, Plaintiff faces an unquantifiable potential harm by way of improper disclosure of sensitive information to the

[10] To the extent the Government challenges Plaintiff's standing to bring this action, the Court addresses that argument below. *See infra* Discussion II.

public.[11] Further, Plaintiff is at risk of suffering injury from the Government's retention and potential use of privileged materials in the course of a process that, thus far, has been closed off to Plaintiff and that has raised at least some concerns as to its efficacy, even if inadvertently so. *See infra* Discussion III. Finally, Plaintiff has claimed injury from the threat of future prosecution and the serious, often indelible stigma associated therewith. As the *Richey* court wrote, "a wrongful indictment is no laughing matter; it often works a grievous, irreparable injury to the person indicted. The stigma cannot be easily erased. In the public mind, the blot on a man's escutcheon, resulting from such a public accusation of wrongdoing, is seldom wiped out by a subsequent judgment of not guilty. Frequently, the public remembers the accusation, and still suspects guilt, even after an acquittal." 515 F.2d at 1244 n.10; *see also In the Matter of John Bennett*, No. 12-61499-CIV-RSR, ECF No. 22 pp. 26–27 (S.D. Fla. July 23, 2013) (explaining that, although some courts have rejected *Richey*'s observation as to the harm posed by indictments, *Richey* remains binding on district courts in the Eleventh Circuit). As a function of Plaintiff's former position as President of the United States, the stigma associated with the subject seizure is in a league of its own. A future indictment, based to any degree on property that ought to be returned, would result in reputational harm of a decidedly different order of magnitude.

As to the fourth *Richey* factor, Plaintiff has persuasively argued that there is no alternative adequate remedy at law. Without Rule 41(g), Plaintiff would have no legal means of seeking the return of his property for the time being and no knowledge of when other relief might become available. *See United States v. Ryan*, 402 U.S. 530, 533 (1971) (expressing concern that the denial to consider Rule 41(g) requests "would mean that the Government might indefinitely retain the

[11] When asked about the dissemination to the media of information relative to the contents of the seized records, Government's counsel stated that he had no knowledge of any leaks stemming from his team but candidly acknowledged the unfortunate existence of leaks to the press.

property without any opportunity for the movant to assert . . . his right to possession"); *Harbor Healthcare Sys., L.P. v. United States*, 5 F.4th 593, 601 (5th Cir. 2021) (explaining that motions to suppress and motions for return of property serve different functions); *United States v. Dean*, 80 F.3d 1535, 1542 (11th Cir. 1996), *opinion modified on reconsideration,* 87 F.3d 1212 (11th Cir. 1996) (making clear that the principle behind the doctrine of equitable jurisdiction—"that the state should not be permitted to deny individuals their property without recourse simply because there is no jurisdiction at law"—applies even when the seizure was lawful).

In combination, these guideposts favor the careful exercise of equitable jurisdiction under the circumstances. This determination is reinforced by the broader landscape of relevant equitable considerations. *See generally Di Giovanni v. Camden Fire Ins. Ass'n*, 296 U.S. 64, 73 (1935) (explaining that courts' discretion in the realm of equity "may properly be influenced by considerations of the public interests involved" and the consequences of any grant of relief); *Smith*, 351 F.2d at 817–18 (elaborating on the breadth and flexibility of equitable considerations); *Richey*, 515 F.2d at 1245 (noting that the four identified factors are "some of the considerations" that should inform courts' determinations); *Mesa Valderrama*, 417 F.3d at 1197 (characterizing the *Richey* factors as guiding considerations). Hence, the Court takes into account the undeniably unprecedented nature of the search of a former President's residence; Plaintiff's inability to examine the seized materials in formulating his arguments to date; Plaintiff's stated reliance on the customary cooperation between former and incumbent administrations regarding the ownership and exchange of documents; the power imbalance between the parties; the importance of maintaining institutional trust; and the interest in ensuring the integrity of an orderly process amidst swirling allegations of bias and media leaks. Measuring the *Richey* factors along with all

of the other considerations pertinent to a holistic equitable analysis, the scales tip decidedly in favor of exercising jurisdiction.[12]

The Court pauses briefly to emphasize the limits of this determination. Plaintiff ultimately may not be entitled to return of much of the seized property or to prevail on his anticipated claims of privilege. That inquiry remains for another day. For now, the circumstances surrounding the seizure in this case and the associated need for adequate procedural safeguards are sufficiently compelling to at least get Plaintiff past the courthouse doors.

II. Standing

There is another threshold argument the Court must consider, and that is the Government's assertion as to Plaintiff's lack of standing [ECF No. 48 pp. 2, 14–16]. The Government posits that Plaintiff lacks standing to bring a Rule 41(g) action or even to seek a special master, because the seized property consists of "Presidential records" over which Plaintiff lacks a "possessory interest" [ECF No. 48 pp. 14–15]. The Government relies on the definition of "Presidential records" under the Presidential Records Act (the "PRA"), *see* 44 U.S.C. § 2201(2), and on the Eleventh Circuit's decision in *Howell*, 425 F.3d at 974; *see supra* note 12.

Plaintiff opposes the Government's standing argument as premature and fundamentally flawed [ECF No. 58 p. 2]. In Plaintiff's view, what matters now is his authority to seek the

[12] At the hearing, the Government argued that the equitable concept of "unclean hands" bars Plaintiff from moving under Rule 41(g), citing *United States v. Howell*, 425 F.3d 971, 974 (11th Cir. 2005) ("[I]n order for a district court to grant a Rule 41(g) motion, the owner of the property must have clean hands."). *Howell* involved a defendant who pled guilty to conspiring to distribute cocaine and then sought the return of $140,000 in government-issued funds that were seized from him following a drug sale to a confidential source. *Id.* at 972–73. That case is not factually analogous to the circumstances presented and does not provide a basis to decline to exercise equitable jurisdiction here. Plaintiff has not pled guilty to any crimes; the Government has not clearly explained how Plaintiff's hands are unclean with respect to the personal materials seized; and in any event, this is not a situation in which there is no room to doubt the immediately apparent incriminating nature of the seized material, as in the case of the sale of cocaine.

appointment of a special master—not his underlying legal entitlement to possess the records or his definable "possessory interest" under Rule 41(g) [ECF No. 58 pp. 4–6]. Moreover, Plaintiff adds, even assuming the Court were inclined at this juncture to consider Plaintiff's potential claim of unreasonableness under the Fourth Amendment, settled law permits him, as the owner of the premises searched, to object to the seizure as unreasonable [ECF No. 58 pp. 2, 4–6].

Having considered these crisscrossing arguments, the Court concludes that Plaintiff is not barred as a matter of standing from bringing this Rule 41(g) action or from invoking the Court's authority to appoint a special master more generally. To have standing to bring a Rule 41(g) motion, a movant must allege "a colorable ownership, possessory or security interest in at least a portion of the [seized] property." *United States v. Melquiades*, 394 F. App'x 578, 584 (11th Cir. 2010) (quoting *United States v. Rodriguez-Aguirre*, 264 F.3d 1195, 1204 (10th Cir. 2001)). Once that preliminary showing is made, the standing requirement is satisfied, because "[the] owner or possessor of property that has been seized necessarily suffers an injury that can be redressed at least in part by the return of the seized property." *United States v. $515,060.42 in U.S. Currency*, 152 F.3d 491, 497 (6th Cir. 1998). Contrary to the Government's reading of *Howell*, Plaintiff need not prove ownership of the property but rather need only allege facts that constitute a colorable showing of a right to possess at least some of the seized property. *Melquiades*, 394 F. App'x at 584. Although the Government argues that Plaintiff has no property interest in any of the presidential records seized from his residence, that position calls for an ultimate judgment on the merits as to those documents and their designations. Further, the Government concedes that the seized property includes "personal effects," 520 pages of potentially privileged material, and at least some material that is in fact privileged [ECF No. 48 pp. 15–16]. This is sufficient to satisfy the standing requirement for the Rule 41(g) request and the request for a special master.

See generally United States v. Stewart, No. 02-CR-395, 2002 WL 1300059 (S.D.N.Y. June 11, 2002) (implicitly accepting that a party has standing to seek review by a special master when at least some of the seized materials are privileged); *United States v. Abbell*, 914 F. Supp. 519 (S.D. Fla. 1995) (same).

III. The Need for Further Review

Having determined that the exercise of jurisdiction is appropriate and that Plaintiff has standing to bring the instant requests, the Court next considers the need for further review of the seized material, as relates to Rule 41(g) and matters of privilege.

Although some of the seized items (e.g., articles of clothing) appear to be readily identifiable as personal property, the parties' submissions suggest the existence of genuine disputes as to (1) whether certain seized documents constitute personal or presidential records, and (2) whether certain seized personal effects have evidentiary value. Because those disputes are bound up with Plaintiff's Rule 41(g) request and involve issues of fact, the Court "must receive evidence" from the parties thereon. *See* Fed. R. Crim. P. 41(g) ("The court must receive evidence on any factual issue necessary to decide the motion."). That step calls for comprehensive review of the seized property.

Review is further warranted, as previewed, for determinations of privilege. The Government forcefully objects, even with respect to attorney-client privilege, pointing out that the Privilege Review Team already has screened the seized property and is prepared to turn over approximately 520 pages of potentially privileged material for court review pursuant to the previously approved ex parte filter protocol [ECF No. 48 p. 14]. In plain terms, the Government's position is that another round of screening would be "unnecessary" [ECF No. 48 p. 22]. The Court takes a different view on this record.

To begin, the Government's argument assumes that the Privilege Review Team's initial screening for potentially privileged material was sufficient, yet there is evidence from which to call that premise into question here. *See In re Sealed Search Warrant & Application for a Warrant by Tel. or Other Reliable Elec. Means*, 11 F.4th at 1249–51; *see also Abbell*, 914 F. Supp. at 520 (appointing a special master even after the government's taint attorney already had reviewed the seized material). As reflected in the Privilege Review Team's Report, the Investigative Team already has been exposed to potentially privileged material. Without delving into specifics, the Privilege Review Team's Report references at least two instances in which members of the Investigative Team were exposed to material that was then delivered to the Privilege Review Team and, following another review, designated as potentially privileged material [ECF No. 40 p. 6]. Those instances alone, even if entirely inadvertent, yield questions about the adequacy of the filter review process.[13]

[13] In explaining these incidents at the hearing, counsel from the Privilege Review Team characterized them as examples of the filter process working. The Court is not so sure. These instances certainly are demonstrative of integrity on the part of the Investigative Team members who returned the potentially privileged material. But they also indicate that, on more than one occasion, the Privilege Review Team's initial screening failed to identify potentially privileged material. The Government's other explanation—that these instances were the result of adopting an overinclusive view of potentially privileged material out of an abundance of caution—does not satisfy the Court either. Even accepting the Government's untested premise, the use of a broad standard for potentially privileged material does not explain how qualifying material ended up in the hands of the Investigative Team. Perhaps most concerning, the Filter Review Team's Report does not indicate that any steps were taken after these instances of exposure to wall off the two tainted members of the Investigation Team [*see* ECF No. 40]. In sum, without drawing inferences, there is a basis on this record to question how materials passed through the screening process, further underscoring the importance of procedural safeguards and an additional layer of review. *See, e.g.*, *In re Grand Jury Subpoenas*, 454 F.3d 511, 523 (6th Cir. 2006) ("In *United States v. Noriega*, 764 F. Supp. 1480 (S.D. Fla. 1991), for instance, the government's taint team missed a document obviously protected by attorney-client privilege, by turning over tapes of attorney-client conversations to members of the investigating team. This *Noriega* incident points to an obvious flaw in the taint team procedure: the government's fox is left in charge of the appellants' henhouse, and may err by neglect or malice, as well as by honest differences of opinion.").

The Government's argument that another round of initial screening is unnecessary also disregards the value added by an outside reviewer in terms of, at a minimum, the appearance of fairness. Even if DOJ filter review teams often pass procedural muster, they are not always perceived to be as impartial as special masters. *See In re Search Warrant for L. Offs. Executed on Mar. 19, 1992*, 153 F.R.D. 55, 59 (S.D.N.Y. 1994) ("It is a great leap of faith to expect that members of the general public would believe any [wall between a filter review team and a prosecution team] would be impenetrable; this notwithstanding our own trust in the honor of an [Assistant United States Attorney]."). Concerns about the perception of fair process are heightened where, as here, the Privilege Review Team and the Investigation Team contain members from the same section within the same DOJ division, even if separated for direct-reporting purposes on this specific matter. "[P]rosecutors have a responsibility to not only see that justice is done, but to also ensure that justice *appears* to be done." *See In re Search Warrant Issued June 13, 2019*, 942 F.3d 159, 183 (4th Cir. 2019), *as amended* (Oct. 31, 2019). A commitment to the appearance of fairness is critical, now more than ever.[14]

Though the foregoing analysis focuses on attorney-client privilege, the Court is not convinced that similar concerns with respect to executive privilege should be disregarded in the manner suggested by the Government. The Government asserts that executive privilege has no

[14] The Government implies that additional independent review for attorney-client privilege, such as by a special master, is appropriate only when a search of a law firm occurred [ECF No. 48 pp. 30–32]. Whatever the extent of this argument, it fails decisively here. True, special masters ordinarily arise in the more traditional setting of law firms and attorneys' offices. But the Court does not see why these concerns would not apply, at least to a considerable degree, to the office and home of a former president. Moreover, at least one other court has authorized additional independent review for attorney-client privilege outside of the law firm context, in politicized circumstances. *See In re Search Warrant dated November 5, 2021*, No. 21-Misc-813, 2021 WL 5845146, at *1 (S.D.N.Y. Dec. 8, 2021) (appointing a special master to conduct review of materials seized from the homes of employees of Project Veritas for potentially attorney-client privileged materials).

role to play here because Plaintiff—a former head of the Executive Branch—is entirely foreclosed from successfully asserting executive privilege against the current Executive Branch [ECF No. 48 pp. 24–25]. In the Court's estimation, this position arguably overstates the law. In *Nixon v. Administrator of General Services*, 433 U.S. 425 (1977), a case involving review of presidential communications by a government archivist, the Supreme Court expressly recognized that (1) former Presidents may assert claims of executive privilege, *id.* at 439; (2) "[t]he expectation of the confidentiality of executive communications . . . [is] subject to erosion over time after an administration leaves office," *id.* at 451; and (3) the incumbent President is "in the best position to assess the present and future needs of the Executive Branch" for purposes of executive privilege, *id.* at 449. The Supreme Court did not rule out the possibility of a former President overcoming an incumbent President on executive privilege matters. Further, just this year, the Supreme Court noted that, at least in connection with a congressional investigation, "[t]he questions whether and in what circumstances a former President may obtain a court order preventing disclosure of privileged records from his tenure in office, in the face of a determination by the incumbent President to waive the privilege, are unprecedented and raise serious and substantial concerns." *Trump v. Thompson*, 142 S. Ct. 680, 680 (2022); *see also id.* at 680 (Kavanaugh, J., respecting denial of application for stay) ("A former President must be able to successfully invoke the Presidential communications privilege for communications that occurred during his Presidency, even if the current President does not support the privilege claim. Concluding otherwise would eviscerate the executive privilege for Presidential communications.").[15] Thus, even if any assertion of executive privilege by Plaintiff ultimately fails in this context, that possibility, even if

[15] On the current record, having been denied an opportunity to inspect the seized documents, Plaintiff has not formally asserted executive privilege as to any specific materials, nor has the incumbent President upheld or withdrawn such an assertion.

likely, does not negate a former President's ability to raise the privilege as an initial matter. Accordingly, because the Privilege Review Team did not screen for material potentially subject to executive privilege, further review is required for that additional purpose.[16]

IV. Appointment of a Special Master

An independent special master should conduct the additional review that is warranted here. Rule 53(a) of the Federal Rules of Civil Procedure empowers courts to appoint a special master to "address pretrial . . . matters that cannot be effectively and timely addressed by an available district judge or magistrate judge of the district." Fed. R. Civ. P. 53(a). Here, as noted, the Government's inventory reflects a seizure of approximately 11,000 documents and 1,800 other items from Plaintiff's residence [*see* ECF No. 39-1]. Considering the volume of seized materials and the parties' expressed desire for swift resolution of this matter, a special master would be better suited than this Court to conduct the review. The appointment of a special master is not uncommon in the context of attorney-client privilege. *See, e.g.*, *In re Search Warrant dated November. 5, 2021*, 2021 WL 5845146, at *2; *Stewart*, 2002 WL 1300059, at *10; *Abbell*, 914 F. Supp. at 520. Nor is the appointment of a special master unheard of in the context of potentially executive privileged material. In fact, the Government itself recently contemplated and requested the appointment of a special master to review for both attorney-client and executive privilege. *See In the Matter of Search Warrants Executed on April 28, 2021*, No. 21-00425-MC-JPO, ECF No. 1 (S.D.N.Y. May 4, 2021) ("[U]nder certain exceptional circumstances, the appointment of a special master to review materials seized from an attorney may be appropriate. Those circumstances may exist

[16] The Court recognizes that, under the PRA, "[t]he United States District Court for the District of Columbia shall have jurisdiction over any action initiated by the former President asserting that a determination made by the Archivist" to permit public dissemination of presidential records "violates the former President's [constitutional] rights or privileges." 44 U.S.C. § 2204.

where . . . the attorney represents the President of the United States such that any search may implicate not only the attorney-client privilege but the executive privilege."). Most importantly, courts recognize that special masters uniquely promote "the interests and appearance of fairness and justice." *United States v. Gallego*, No. CR-18-01537-001, 2018 WL 4257967, at *3 (D. Ariz. Sept. 6, 2018); *see also In re Search Warrants Executed on April 28, 2021*, No. 21-MC-425 (JPO), 2021 WL 2188150, at *4 (S.D.N.Y. May 28, 2021) ("The Court agrees that the appointment of a special master is warranted here to ensure the perception of fairness."). Special effort must be taken to further those ends here.

V. Temporary Injunctive Relief

As a final matter, the Court determines that a temporary injunction on the Government's use of the seized materials for investigative purposes—but not ODNI's national security assessment—is appropriate and equitable to uphold the value of the special master review.[17] It is not entirely clear whether courts must perform an additional analysis under Rule 65 of the Federal Rules of Civil Procedure in this context, seeing as how a temporary restraint on use naturally furthers and complements the appointment of a special master. *See, e.g.*, *Stewart*, 2002 WL 1300059, at *10 (instructing the government not to review the seized documents pending further instruction). To appoint a special master to make privilege determinations while simultaneously allowing the Government, in the interim, to continue using potentially privileged material for

[17] Although the Motion asks the Court to enjoin the Government's review of the seized materials pending the appointment of a special master, it is clear that this request is meant to cover the Government's temporary use of the seized materials and extend into the special master's review process as appropriate. Any uncertainty on this point was clarified by Plaintiff's presentation at the hearing. *See United States v. Potes Ramirez*, 260 F.3d 1310, 1315 (11th Cir. 2001) ("In the context of Rule 41[(g)] motions, several circuit courts have remarked on a district court's authority to fashion an equitable remedy[] when appropriate . . . .").

investigative purposes would be to ignore the pressing concerns and hope for the best.[18] Moreover, many courts that have explicitly issued injunctions relating to special master review have done so without discussing Rule 65. *See USA v. Gallego et al*, No. 18-01537-CR-RM-BGM-1, ECF Nos. 26, 36 (Aug. 9 & 10, 2018). In any event, the Government reasonably maintains (without objection from Plaintiff) that the Court must engage with Rule 65, and so for the sake of completeness and prudence, the Court proceeds accordingly.[19]

Rule 65 recognizes the power of courts to issue injunctive relief. Such relief is considered "extraordinary," and to obtain it, a movant must "clearly carr[y] the burden of persuasion" as to the following factors: (1) a substantial likelihood of success on the merits; (2) irreparable injury unless the injunction is issued; (3) the threatened injury to the movant outweighs whatever damage the injunction may cause to the opposing party; and (4) the injunction would not be adverse to the public interest. *United States v. Jefferson Cnty.*, 720 F.2d 1511, 1519 (11th Cir. 1983) (quoting *Canal Authority v. Callaway*, 489 F.2d 567, 573 (5th Cir. 1974)). "When the government is the opposing party, as it is here, the third and fourth factors merge." *Georgia v. President of the United States*, No. 21-14269, 2022 WL 3703822, at *3 (11th Cir. Aug. 26, 2022).

As discussed above, *see supra* Discussion III, the Court is satisfied that Plaintiff has "a likelihood of success on the merits of [his] challenge to the [Privilege Review Team] and its [p]rotocol." *In re Search Warrant Issued June 13, 2019*, 942 F.3d at 171; *see also In re Sealed Search Warrant & Application for a Warrant by Tel. or Other Reliable Elec. Means*, 11 F.4th at 1248–49 (assessing "likelihood of success on the merits" in terms of the sufficiency of the filter

[18] Even without a temporary injunction as described herein, the Court would exercise its discretion to appoint a special master despite the considerably diminished utility of such an appointment.

[19] Because this part of the Order relies on much of the same reasoning articulated above, the Court uses internal cross-references where appropriate to minimize repetition.

team's review). For the same reasons—chiefly, the risk that the Government's filter review process will not adequately safeguard Plaintiff's privileged and personal materials in terms of exposure to either the Investigative Team or the media—Plaintiff has sufficiently established irreparable injury.

With regard to the injury factor, the Government contends that the timing of the Motion—filed two weeks after the subject seizure occurred—"militates against a finding of irreparable harm" [ECF No. 48 p. 20 (quoting *Wreal, LLC v. Amazon.com, Inc.*, 840 F.3d 1244, 1248 (11th Cir. 2016))]. The Court disagrees. As the Government acknowledges, denials of injunctive relief based on a party's delay usually arise in the context of considerably longer periods of time than the fourteen-day span implicated here. *Wreal*, 840 F.3d at 1244, 1248. Nor has the Government offered any authority denying injunctive relief on the basis of a two-week span. On the contrary, courts have held that delays of two or three weeks are not sufficiently long to undercut a showing of irreparable harm. *See, e.g.*, *Tom Doherty Assocs. v. Saban Ent, Inc.*, 60 F.3d 27, 39–40 (2d Cir. 1995); *Fisher-Price Inc. v. Well-Made Toy Mfg. Corp.*, 25 F.3d 119, 125 (2d Cir. 1994), *abrogated on other grounds by Belair v. MGA Ent., Inc.*, 503 F. App'x 65 (2d Cir. 2021). The Government thus is left to suggest that two weeks, perhaps ordinarily acceptable, is too long here because requests for special masters to review privileged material are typically made on a more expedited basis [ECF No. 48 pp. 20–21]. On balance, the Court is not persuaded. It is undisputed that Plaintiff's counsel attempted to resolve Plaintiff's request for a special master and other relief informally with the Government almost immediately after the search, without judicial intervention [*see* ECF No. 1 pp. 8–9]. In view of Plaintiff's timely attempt toward a negotiated resolution of this issue, along with Plaintiff's inability to know the extent of what was seized, the Court is satisfied that Plaintiff did not "slumber[] on [his] rights." *In re Search Warrant Issued June 13,*

2019, 942 F.3d at 182. While Plaintiff perhaps did not act as promptly as he could have, the two-week delay does not now preclude Plaintiff from seeking or being entitled to injunctive relief.

Lastly, with respect to the merged third and fourth factors, Plaintiff has shown, all in all, that the public and private interests at stake support a temporary enjoinment on the use of the seized materials for investigative purposes, without impacting the Government's ongoing national security review. As Plaintiff articulated at the hearing, the investigation and treatment of a former president is of unique interest to the general public, and the country is served best by an orderly process that promotes the interest and perception of fairness. *See supra* Discussion III–IV; *see also In re Search Warrant Issued June 13, 2019*, 942 F.3d at 182 ("[A]n award of injunctive relief in these circumstances supports the 'strong public interest' in the integrity of the judicial system." (quoting *United States v. Hasting*, 461 U.S. 499, 527 (1983) (Brennan, J., concurring in part and dissenting in part))). The Government's principal objection is that an injunction pending resolution of the special master's review would delay the associated criminal investigation and national security risk assessment [ECF No. 48 pp. 29–30]. With respect to the referenced national security concerns, the Court understands and does not impact that component. But with respect to the Government's ongoing criminal investigation, the Court does not find that a temporary special master review under the present circumstances would cause undue delay.[20] "[E]fficient criminal investigations are certainly desirable," *In re Search Warrant Issued June 13, 2019*, 942 F.3d at 181, but so too are countervailing considerations of fair process and public trust. "[T]he [G]overnment chose to proceed by securing a search warrant for [the former President's home and office] and seeking and obtaining [a] magistrate judge's approval of the [f]ilter [p]rotocol. The

[20] The Government represents that it completed a preliminary review of the seized property in approximately three weeks [ECF Nos. 39, 40].

[G]overnment should have been fully aware that use of a filter team in these circumstances was ripe for substantial legal challenges, and should have anticipated that those challenges could delay its investigations." *In re Search Warrant Issued June 13, 2019*, 942 F.3d at 181. None of this should be read to minimize the importance of investigating criminal activity or to indicate anything about the merits of any future court proceeding.

For all of these reasons, upon full consideration of the Rule 65 factors, the Court determines that a temporary injunction on the Government's use of the seized materials for criminal investigative purposes pending resolution of the special master's review process is warranted. The Court is mindful that restraints on criminal prosecutions are disfavored[21] but finds that these unprecedented circumstances call for a brief pause to allow for neutral, third-party review to ensure a just process with adequate safeguards.

CONCLUSION

Accordingly, it is hereby **ORDERED AND ADJUDGED** as follows:

1. A special master shall be **APPOINTED** to review the seized property, manage assertions of privilege and make recommendations thereon, and evaluate claims for return of property. The exact details and mechanics of this review process will be decided expeditiously following receipt of the parties' proposals as described below.
2. The Government is **TEMPORARILY ENJOINED** from further review and use of any of the materials seized from Plaintiff's residence on August 8, 2022, for criminal investigative purposes pending resolution of the special master's review process as

[21] *See Younger v. Harris*, 401 U.S. 37, 43–44 (1971) ("[C]ourts of equity should not . . . act to restrain a criminal prosecution[] when the moving party has an adequate remedy at law and will not suffer irreparable injury if denied equitable relief."); *Stefanelli v. Minard*, 342 U.S. 117, 120 (1951) (explaining that "[t]he maxim that equity will not enjoin a criminal prosecution" applies with greatest force in the context of the federal government interfering with state prosecutions).

determined by this Court. The Government may continue to review and use the materials seized for purposes of intelligence classification and national security assessments.

3. On or before **September 9, 2022**, the parties shall meaningfully confer and submit a joint filing that includes:
    a. a list of proposed special master candidates; and
    b. a detailed proposed order of appointment in accordance with Rule 53(b), outlining, *inter alia*, the special master's duties and limitations consistent with this Order, ex parte communication abilities, schedule for review, and compensation.
4. Any points of substantive disagreement as to 3(a) or (b) should be identified in the forthcoming joint filing.
5. The Court **RESERVES RULING** on Plaintiff's request for return of property pending further review.
6. This Order is subject to modification as appropriate.

DONE AND ORDERED in Chambers at Fort Pierce, Florida this 5th day of September 2022.

AILEEN M. CANNON
UNITED STATES DISTRICT JUDGE

cc: counsel of record

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
WEST PALM BEACH DIVISION
----------X

DONALD J. TRUMP,

Plaintiff,

- v -

UNITED STATES OF AMERICA

Defendant.
----------X

DECLARATION

No. 22-CV-81294-CANNON

DECLARATION OF
ALAN E. KOHLER, JR., ASSISTANT DIRECTOR,
COUNTERINTELLIGENCE DIVISION,
FEDERAL BUREAU OF INVESTIGATION

I, Alan E. Kohler, Jr., hereby declare the following:

1. I am the Assistant Director of the Counterintelligence Division ("the Division") of the Federal Bureau of Investigation ("FBI"), United States Department of Justice ("DOJ"). The Division oversees FBI efforts to deter, detect, and neutralize foreign intelligence threats to the United States and its interests, encompassing the national security operations of the China and Russia/Global/Iran Mission Centers. The Division also is responsible for all investigations involving mishandling of classified or national defense information.

2. As the Assistant Director of the Counterintelligence Division, I am responsible for, among other things, directing and overseeing the programs responsible for conducting counterintelligence investigations. I am also the accountable executive for the files and records of the Division. In my management and oversight capacity for the Division, which includes its national security investigations and operations, I am also responsible for the protection of

classified national security information and processes within the Division, including information in the Division's possession as a result of its investigative efforts. I have been delegated original classification authority by the Attorney General. *See* Executive Order 13526 § 1.3(c). As a result, and pursuant to all applicable Executive Orders, I am responsible for the protection of classified national security and law enforcement sensitive information. Thus, I have been authorized by the Attorney General and the Director of the FBI to execute declarations and affidavits in order to protect such information.

3. The matters stated herein are based on my personal knowledge, my review and consideration of documents and information available to me in my official capacity, and information furnished by Special Agents and other employees of the FBI. My conclusions have been reached in accordance therewith.

Purpose of the Declaration

4. I submit this Declaration in support of the Government's Motion for a Partial Stay Pending Appeal. This matter relates to the FBI's execution of a search warrant at the premises of Plaintiff Donald J. Trump, based on a finding of probable cause that the search would uncover evidence of violations of 18 U.S.C. §§ 793 (willful retention of national defense information), 2071 (concealment or removal of government records), and 1519 (obstruction of a federal investigation). During the search, the FBI seized thirty-three boxes, containers, or other items of evidence, which contained just over one hundred records with classification markings, including records marked TOP SECRET and records marked as containing additional sensitive compartmented information. Plaintiff subsequently initiated proceedings in this Court, seeking an order appointing a special master to review all seized materials and manage potential claims of attorney-client and executive privilege, as well as an injunction barring the Government's review

and use of the seized materials. On September 5, 2022, the Court issued an Order "authoriz[ing] the appointment of a special master to review the seized property for personal items and documents and potentially privileged material subject to claims of attorney-client and/or executive privilege," and "enjoin[ing] the Government from reviewing and using the seized materials for investigative purposes pending completion of the special master's review or further Court order."

5. I understand that the Government's motion this Declaration supports seeks a stay to the extent the Court's Order (1) enjoins the further review and use for criminal investigative purposes of records bearing classification markings that were recovered pursuant to a court-authorized search warrant and (2) requires the government to disclose those classified records to a special master for review. This Declaration specifically addresses the irreparable harm to the national security that would result from enjoining the further review and use of records bearing classification markings for criminal investigative purposes.

The Intelligence Community's Classification Review and National Security Risk Assessment Are Inextricably Linked With the Criminal Investigation

6. As previously explained, the Counterintelligence Division, for which I am the responsible executive, conducts the FBI's investigations involving mishandling of classified or national defense information. Such investigations fundamentally require the FBI to understand the nature of the information at issue, including its proper classification. Thus, the FBI must conduct an assessment of the relevant information, including by obtaining a classification review. As part of a classification review, an original classification authority is asked to determine whether documents bearing classification markings are, in fact, properly classified—*i.e.*, whether "the unauthorized disclosure of the information reasonably could be expected to result in damage to the national security." E.O. 13526 § 1.1(a)(4). The classification review is necessary to determine

whether harm would result if the materials were disclosed—*i.e.*, to conduct the national security risk assessment that has been described in this case by the Government and the Court.

7. In this matter, to effectuate the IC's classification review, the FBI must be able to access the evidence, duplicate it, discern the appropriate IC agency or agencies to which it should be provided, and deliver copies to the appropriate agency or agencies. Given the breadth of documents seized during the August 8, 2022, search of the Premises, and the number of relevant Departments and agencies with equities in those documents, the Office of the Director of National Intelligence ("ODNI") agreed to oversee and help coordinate the ongoing classification review. Such review, as noted, will enable the Government to assess the potential harms to national security resulting from any improper retention and storage of classified information. At the same time, however, this review will inform the FBI's ongoing criminal investigation into the potential mishandling of classified or national defense information.

8. The connection between the national security and criminal investigative aspects of this matter are grounded in the dual mission of the FBI. That is, the FBI itself is part of the United States Intelligence Community ("IC"), and since the 9/11 attacks, the FBI has integrated its intelligence and law enforcement functions when it exercises its national security mission. The FBI conducts investigations that may constitute an exercise both of the FBI's criminal investigation authority and of the FBI's authority to investigate threats to the national security.

9. Thus, the overlap of the FBI's criminal investigative and national security-related missions would make it exceedingly difficult to bifurcate the FBI personnel working on the criminal investigation from those working in conjunction with other departments or agencies in the IC. Moreover, as noted above, the IC assessments necessarily will inform the FBI's criminal investigation, including subsequent investigative steps that might be necessary. If, for example,

another IC element were to obtain intelligence indicating that a classified document in the seized materials might have been compromised, the FBI would be responsible for taking some of the necessary steps to evaluate that risk. The same is true of the empty folders with "'classified' banners" that were among the seized materials in this case: the FBI's investigative authorities could be instrumental in determining what materials may once have been stored in these folders and whether they may have been lost or compromised—steps that, again, may require the use of grand jury subpoenas, search warrants, and other criminal investigative tools, and investigative efforts that could lead to evidence that would also be highly relevant to advancing the FBI's criminal investigation. Significantly, while other IC elements may have certain limited investigative authorities, the FBI is the only IC element with a full suite of authorities and tools to investigate and recover any improperly retained and stored classified information in the United States. Given its broad counterintelligence and law enforcement mandates, the FBI is critical to the whole-of-government effort to address any national security risks at issue in this case.

10. Furthermore, even were it feasible to bifurcate the FBI personnel involved in the Government's national security risk assessment from those involved in its criminal investigation, in practical terms, doing so makes little sense, given that the same senior DOJ and FBI officials, such as myself, are ultimately responsible for supervising the criminal investigation and for ensuring that the FBI is coordinating appropriately with the rest of the IC on its classification review and assessment.

Conclusion

11. For all the reasons set forth herein, the Intelligence Community's classification review and national security risk assessment are inextricably linked with the criminal investigation.

I therefore submit this Declaration in support of the Government's Motion for a Partial Stay Pending Appeal.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on September 8, 2022.

Alan E. Kohler, Jr.
Assistant Director
Counterintelligence Division
Federal Bureau of Investigation

Archivist *of the*
United States

May 10, 2022

Evan Corcoran
Silverman Thompson
400 East Pratt Street
Suite 900
Baltimore, MD 21202
By Email

Dear Mr. Corcoran:

I write in response to your letters of April 29, 2022, and May 1, 2022, requesting that the National Archives and Records Administration (NARA) further delay the disclosure to the Federal Bureau of Investigation (FBI) of the records that were the subject of our April 12, 2022 notification to an authorized representative of former President Trump.

As you are no doubt aware, NARA had ongoing communications with the former President's representatives throughout 2021 about what appeared to be missing Presidential records, which resulted in the transfer of 15 boxes of records to NARA in January 2022. In its initial review of materials within those boxes, NARA identified items marked as classified national security information, up to the level of Top Secret and including Sensitive Compartmented Information and Special Access Program materials. NARA informed the Department of Justice about that discovery, which prompted the Department to ask the President to request that NARA provide the FBI with access to the boxes at issue so that the FBI and others in the Intelligence Community could examine them. On April 11, 2022, the White House Counsel's Office—affirming a request from the Department of Justice supported by an FBI letterhead memorandum—formally transmitted a request that NARA provide the FBI access to the 15 boxes for its review within seven days, with the possibility that the FBI might request copies of specific documents following its review of the boxes.

Although the Presidential Records Act (PRA) generally restricts access to Presidential records in NARA's custody for several years after the conclusion of a President's tenure in office, the statute further provides that, "subject to any rights, defenses, or privileges which the United States or any agency or person may invoke," such records "shall be made available . . . to an incumbent President if such records contain information that is needed for the conduct of current business of the incumbent President's office and that is not otherwise available." 44 U.S.C. §

Debra Steidel Wall · T: 202.357.5900 · F: 202.357.5901 · *debra.wall@nara.gov*
National Archives *and* Records Administration · 8601 Adelphi Road · College Park, MD 20740 · *www.archives.gov*

2205(2)(B). Those conditions are satisfied here. As the Department of Justice's National Security Division explained to you on April 29, 2022:

> There are important national security interests in the FBI and others in the Intelligence Community getting access to these materials. According to NARA, among the materials in the boxes are over 100 documents with classification markings, comprising more than 700 pages. Some include the highest levels of classification, including Special Access Program (SAP) materials. Access to the materials is not only necessary for purposes of our ongoing criminal investigation, but the Executive Branch must also conduct an assessment of the potential damage resulting from the apparent manner in which these materials were stored and transported and take any necessary remedial steps. Accordingly, we are seeking immediate access to these materials so as to facilitate the necessary assessments that need to be conducted within the Executive Branch.

We advised you in writing on April 12 that, "in light of the urgency of this request," we planned to "provid[e] access to the FBI next week," i.e., the week of April 18. *See* Exec. Order No. 13,489, § 2(b), 74 Fed. Reg. 4,669 (Jan. 21, 2009) (providing a 30-day default before disclosure but authorizing the Archivist to specify "a shorter period of time" if "required under the circumstances"); *accord* 36 C.F.R. § 1270.44(g) ("The Archivist may adjust any time period or deadline under this subpart, as appropriate, to accommodate records requested under this section."). In response to a request from another representative of the former President, the White House Counsel's Office acquiesced in an extension of the production date to April 29, and so advised NARA. In accord with that agreement, we had not yet provided the FBI with access to the records when we received your letter on April 29, and we have continued to refrain from providing such access to date.

It has now been four weeks since we first informed you of our intent to provide the FBI access to the boxes so that it and others in the Intelligence Community can conduct their reviews. Notwithstanding the urgency conveyed by the Department of Justice and the reasonable extension afforded to the former President, your April 29 letter asks for additional time for you to review the materials in the boxes "in order to ascertain whether any specific document is subject to privilege," and then to consult with the former President "so that he may personally make any decision to assert a claim of constitutionally based privilege." Your April 29 letter further states that in the event we do not afford you further time to review the records before NARA discloses them in response to the request, we should consider your letter to be "a protective assertion of executive privilege made by counsel for the former President."

The Counsel to the President has informed me that, in light of the particular circumstances presented here, President Biden defers to my determination, in consultation with the Assistant Attorney General for the Office of Legal Counsel, regarding whether or not I should uphold the former President's purported "protective assertion of executive privilege." *See* 36 C.F.R. § 1270.44(f)(3). Accordingly, I have consulted with the Assistant Attorney General for the Office of Legal Counsel to inform my "determination as to whether to honor the former President's claim of privilege or instead to disclose the Presidential records notwithstanding the claim of privilege." Exec. Order No. 13,489, § 4(a).

The Assistant Attorney General has advised me that there is no precedent for an assertion of executive privilege by a former President *against an incumbent President* to prevent the latter from obtaining from NARA Presidential records belonging to the Federal Government where "such records contain information that is needed for the conduct of current business of the incumbent President's office and that is not otherwise available." 44 U.S.C. § 2205(2)(B).

To the contrary, the Supreme Court's decision in *Nixon v. Administrator of General Services*, 433 U.S. 425 (1977), strongly suggests that a former President may not successfully assert executive privilege "against the very Executive Branch in whose name the privilege is invoked." *Id.* at 447-48. In *Nixon v. GSA*, the Court rejected former President Nixon's argument that a statute requiring that Presidential records from his term in office be maintained in the custody of, and screened by, NARA's predecessor agency—a "very limited intrusion by personnel in the Executive Branch sensitive to executive concerns"—would "impermissibly interfere with candid communication of views by Presidential advisers." *Id.* at 451; *see also id.* at 455 (rejecting the claim). The Court specifically noted that an "incumbent President should not be dependent on happenstance or the whim of a prior President when he seeks access to records of past decisions that define or channel current governmental obligations." *Id.* at 452; *see also id.* at 441-46 (emphasizing, in the course of rejecting a separation-of-powers challenge to a provision of a federal statute governing the disposition of former President Nixon's tape recordings, papers, and other historical materials "within the Executive Branch," where the "employees of that branch [would] have access to the materials only 'for lawful Government use,'" that "[t]he Executive Branch remains in full control of the Presidential materials, and the Act facially is designed to ensure that the materials can be released only when release is not barred by some applicable privilege inherent in that branch"; and concluding that "nothing contained in the Act renders it unduly disruptive of the Executive Branch").

It is not necessary that I decide whether there might be *any* circumstances in which a former President could successfully assert a claim of executive privilege to prevent an Executive Branch agency from having access to Presidential records for the performance of valid executive functions. The question in this case is not a close one. The Executive Branch here is seeking access to records belonging to, and in the custody of, the Federal Government itself, not only in order to investigate whether those records were handled in an unlawful manner but also, as the National Security Division explained, to "conduct an assessment of the potential damage resulting from the apparent manner in which these materials were stored and transported and take any necessary remedial steps." These reviews will be conducted by current government personnel who, like the archival officials in *Nixon v. GSA*, are "sensitive to executive concerns." *Id.* at 451. And on the other side of the balance, there is no reason to believe such reviews could "adversely affect the ability of future Presidents to obtain the candid advice necessary for effective decisionmaking." *Id.* at 450. To the contrary: Ensuring that classified information is appropriately protected, and taking any necessary remedial action if it was not, are steps essential to preserving the ability of future Presidents to "receive the full and frank submissions of facts and opinions upon which effective discharge of [their] duties depends." *Id.* at 449.

Because an assertion of executive privilege against the incumbent President under these circumstances would not be viable, it follows that there is no basis for the former President to make a "protective assertion of executive privilege," which the Assistant Attorney General

informs me has never been made outside the context of a congressional demand for information from the Executive Branch. Even assuming for the sake of argument that a former President may under some circumstances make such a "protective assertion of executive privilege" to preclude the Archivist from complying with a disclosure otherwise prescribed by 44 U.S.C. § 2205(2), there is no predicate for such a "protective" assertion here, where there is no realistic basis that the requested delay would result in a viable assertion of executive privilege against the incumbent President that would prevent disclosure of records for the purposes of the reviews described above. Accordingly, the only end that would be served by upholding the "protective" assertion here would be to delay those very important reviews.

I have therefore decided not to honor the former President's "protective" claim of privilege. *See* Exec. Order No. 13,489, § 4(a); *see also* 36 C.F.R. 1270.44(f)(3) (providing that unless the incumbent President "uphold[s]" the claim asserted by the former President, "the Archivist discloses the Presidential record"). For the same reasons, I have concluded that there is no reason to grant your request for a further delay before the FBI and others in the Intelligence Community begin their reviews. Accordingly, NARA will provide the FBI access to the records in question, as requested by the incumbent President, beginning as early as Thursday, May 12, 2022.

Please note that, in accordance with the PRA, 44 U.S.C. § 2205(3), the former President's designated representatives can review the records, subject to obtaining the appropriate level of security clearance. Please contact my General Counsel, Gary M. Stern, if you would like to discuss the details of such a review, such as you proposed in your letter of May 5, 2022, particularly with respect to any unclassified materials.

Sincerely,

Debra Steidel Wall

DEBRA STEIDEL WALL
Acting Archivist of the United States

AO 110 (Rev. 06/09) Subpoena to Testify Before a Grand Jury

UNITED STATES DISTRICT COURT

for the

District of Columbia

SUBPOENA TO TESTIFY BEFORE A GRAND JURY

To: Custodian of Records
The Office of Donald J. Trump
1100 South Ocean Blvd.
Palm Beach, FL 33480

YOU ARE COMMANDED to appear in this United States district court at the time, date, and place shown below to testify before the court's grand jury. When you arrive, you must remain at the court until the judge or a court officer allows you to leave.

Place:	Date and Time:
U.S. DISTRICT COURT FOR THE DISTRICT OF COLUMBIA U.S. Courthouse, 3rd Floor Grand Jury #21-09 333 Constitution Avenue, N.W. Washington, D.C. 20001	May 24, 2022 9:00 a.m.

You must also bring with you the following documents, electronically stored information, or objects:

Any and all documents or writings in the custody or control of Donald J. Trump and/or the Office of Donald J. Trump bearing classification markings, including but not limited to the following: Top Secret, Secret, Confidential, Top Secret/SI-G/NOFORN/ORCON, Top Secret/SI-G/NOFORN, Top Secret/HCS-O/NOFORN/ORCON, Top Secret/HCS-O/NOFORN, Top Secret/HCS-P/NOFORN/ORCON, Top Secret/HCS-P/NOFORN, Top Secret/TK/NOFORN/ORCON, Top Secret/TK/NOFORN, Secret/NOFORN, Confidential/NOFORN, TS, TS/SAP, TS/SI-G/NF/OC, TS/SI-G/NF, TS/HCS-O/NF/OC, TS/HCS-O/NF, TS/HCS-P/NF/OC, TS/HCS-P/NF, TS/HCS-P/SI-G, TS/HCS-P/SI/TK, TS/TK/NF/OC, TS/TK/NF, S/NF, S/FRD, S/NATO, S/SI, C, and C/NF.

Date: May 11, 2022

The name, address, telephone number and email of the prosecutor who requests this subpoena are:

Jay I. Bratt
950 Pennsylvania Avenue, NW
Washington, D.C. 20530
jay.bratt2@usdoj.gov
[redacted]

Subpoena #GJ2022042790054

CO 293 (Rev. 8/91) Subpoena to Testify Before Grand Jury

RETURN OF SERVICE (1)		
RECEIVED BY SERVER	DATE	PLACE
SERVED	DATE	PLACE
SERVED ON (PRINT NAME)		
SERVED BY (PRINT NAME)		TITLE

STATEMENT OF SERVICE FEES		
TRAVEL	SERVICES	TOTAL

DECLARATION OF SERVER (2)

I declare under penalty of perjury under the laws of the United States of America that the foregoing information contained in the Return of Service and Statement of Service Fees is true and correct.

Executed on _____
Date

_____
Signature of Server

_____
Address of Server

ADDITIONAL INFORMATION

(1) As to who may serve a subpoena and the manner of its service see Rule 17(d), Federal Rules of Criminal Procedure, or Rule 45(c), Federal Rules of Civil Procedure.

(2) "Fees and mileage need not be tendered to the witness upon service of a subpoena issued on behalf of the United States or an officer or agency thereof (Rule 45(c), Federal rules of Civil Procedure; Rule 17(d), Federal Rules of Criminal Procedure) or on behalf of
certain indigent parties and criminal defendants who are unable to pay such costs (28 USC 1825, Rule 17(b) Federal Rules of Criminal Procedure)".

Subpoena #GJ2022042790054

CERTIFICATION

I hereby certify as follows:

1. I have been designated to serve as Custodian of Records for The Office of Donald J. Trump, for purposes of the testimony and documents subject to subpoena #GJ20222042790054.
2. I understand that this certification is made to comply with the subpoena, in lieu of a personal appearance and testimony.
3. Based upon the information that has been provided to me, I am authorized to certify, on behalf of the Office of Donald J. Trump, the following:
    a. A diligent search was conducted of the boxes that were moved from the White House to Florida;
    b. This search was conducted after receipt of the subpoena, in order to locate any and all documents that are responsive to the subpoena;
    c. Any and all responsive documents accompany this certification; and
    d. No copy, written notation, or reproduction of any kind was retained as to any responsive document.

I swear or affirm that the above statements are true and correct to the best of my knowledge.

Dated: June 3, 2022

[redacted]


TOP SECRET//SCI
SECRET//SCI
CONTAINS SENSITIVE COMPARTMENTED INFORMATION
UP TO HCS-P/SI/TK
THIS IS A COVERSHEET
FOR CLASSIFIED INFORMATION
SECRET
CONFIDENTIAL
2A
BANKERS BOX
TIME

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 22-MJ-8332-BER

IN RE SEALED SEARCH WARRANT **FILED UNDER SEAL**

_____/

SECOND NOTICE OF FILING OF REDACTED DOCUMENTS

The United States hereby gives notice that it is filing the following document, which is a redacted version of material previously filed in this case number under seal:

- The criminal cover sheet associated with the August 5, 2022 warrant application (Docket Entry 1, page 1);
- The cover sheet to the August 5, 2022 warrant application (Docket Entry 1, page 4);
- The government's motion to seal the search warrant (Docket Entry 2); and
- The Court's order sealing the warrant and related materials (Docket Entry 3).

JUAN ANTONIO GONZALEZ
United States Attorney

By:_____
United States Attorney
Florida Bar No. 897388
99 NE 4th Street, 8th Floor
Miami, Fl 33132
Tel: 305-961-9001
Email: juan.antonio.gonzalez@usdoj.gov

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 22-mj-8332-BER

IN RE SEALED SEARCH WARRANT
_____/

CRIMINAL COVER SHEET

1. Did this matter originate from a matter pending in the Northern Region of the United States Attorney's Office prior to August 8, 2014 (Mag. Judge Shaniek Maynard)? No

2. Did this matter originate from a matter pending in the Central Region of the United States Attorney's Office prior to October 3, 2019 (Mag. Judge Jared Strauss)? No

Respectfully submitted,

JUAN ANTONIO GONZALEZ
UNITED STATES ATTORNEY

BY: [redacted]
Assistant United States Attorney
[redacted]
99 Northeast 4th Street
Miami, Florida 33132-2111
Telephone: [redacted]
E-mail: [redacted]

AO 106A (08/18) Application for a Warrant by Telephone or Other Reliable Electronic Means

UNITED STATES DISTRICT COURT

for the

Southern District of Florida

In the Matter of the Search of
(Briefly describe the property to be searched or identify the person by name and address)

the Premises Located at 1100 S. Ocean Blvd., Palm Beach, FL 33480, as further described in Attachment A

Case No. 22-mj-8332-BER

APPLICATION FOR A WARRANT BY TELEPHONE OR OTHER RELIABLE ELECTRONIC MEANS

I, a federal law enforcement officer or an attorney for the government, request a search warrant and state under penalty of perjury that I have reason to believe that on the following person or property *(identify the person or describe the property to be searched and give its location):*

See Attachment A

located in the Southern District of Florida, there is now concealed *(identify the person or describe the property to be seized):*

See Attachment B

The basis for the search under Fed. R. Crim. P. 41(c) is *(check one or more):*

- ☑ evidence of a crime;
- ☑ contraband, fruits of crime, or other items illegally possessed;
- ☐ property designed for use, intended for use, or used in committing a crime;
- ☐ a person to be arrested or a person who is unlawfully restrained.

The search is related to a violation of:

Code Section	*Offense Description*
18 U.S.C. § 793	Willful retention of national defense information
18 U.S.C. § 2071	Concealment or removal of government records
18 U.S.C. § 1519	Obstruction of federal investigation

The application is based on these facts:

See attached Affidavit of FBI Special Agent [redacted]

- ☑ Continued on the attached sheet.
- ☐ Delayed notice of ____ days *(give exact ending date if more than 30 days:* _____ *)* is requested under 18 U.S.C. § 3103a, the basis of which is set forth on the attac[redacted]

[redacted]

[redacted] Special Agent, FBI

Applicant's signature

Printed name and title

Attested to by the applicant in accordance with the requirements of Fed. R. Crim. P. 4.1 by Phone (WhatsApp) *(specify reliable electronic means).*

Date: 08/05/2022

Judge's signature

City and state: West Palm Beach, Florida

Hon. Bruce E. Reinhart, U.S. Magistrate Judge

Printed name and title

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 22-mj-8332-BER

IN RE: SEARCH WARRANT

HIGHLY SENSITIVE DOCUMENT

_____/

MOTION TO SEAL

The United States of America, by and through the undersigned Assistant United States Attorney, hereby moves to seal this Motion, the Search Warrant, and all its accompanying documents, until further order of this Court. The United States submits that there is good cause because the integrity of the ongoing investigation might be compromised, and evidence might be destroyed.

The United States further requests that, pursuant to this Court's procedures for Highly Sensitive documents, all documents associated with this investigation not be filed on the Court's electronic docket because filing these materials on the electronic docket poses a risk to safety given the sensitive nature of the material contained therein.

Respectfully submitted,

JUAN ANTONIO GONZALEZ
UNITED STATES ATTORNEY

BY: [redacted]
Assistant United States Attorney
[redacted]
99 Northeast 4th Street
Miami, Florida 33132-2111
[redacted]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 22-mj-8332-BER

IN RE: SEARCH WARRANT

HIGHLY SENSITIVE DOCUMENT

_____/

SEALING ORDER

The United States of America, having applied to this Court for an Order sealing the Motion to Seal, the Search Warrant and all its accompanying documents, and this order and the Court finding good cause:

IT IS HEREBY ORDERED that the Motion to Seal, the Search Warrant and its accompanying documents, and this Order shall be filed under seal until further order of this Court. However, the United States Attorney's Office and the Federal Bureau of Investigation may obtain copies of any sealed document for purposes of executing the search warrant.

DONE AND ORDERED in chambers at West Palm Beach, Florida, this 5TH day of August 2022.

HON. BRUCE E. REINHART
UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

IN THE MATTER OF THE SEARCH OF:	)	
	)	Case No.
LOCATIONS WITHIN THE PREMISES	)	
TO BE SEARCHED IN ATTACHMENT A	)	**Filed Under Seal**

AFFIDAVIT IN SUPPORT OF AN APPLICATION UNDER RULE 41 FOR A WARRANT TO SEARCH AND SEIZE

I, [redacted], being first duly sworn, hereby depose and state as follows:

INTRODUCTION AND AGENT BACKGROUND

1. The government is conducting a criminal investigation concerning the improper removal and storage of classified information in unauthorized spaces, as well as the unlawful concealment or removal of government records. The investigation began as a result of a referral the United States National Archives and Records Administration (NARA) sent to the United States Department of Justice (DOJ) on February 9, 2022, hereinafter, "NARA Referral." The NARA Referral stated that on January 18, 2022, in accordance with the Presidential Records Act (PRA), NARA received from the office of former President DONALD J. TRUMP, hereinafter "FPOTUS," via representatives, fifteen (15) boxes of records, hereinafter, the "FIFTEEN BOXES." The FIFTEEN BOXES, which had been transported from the FPOTUS property at 1100 S Ocean Blvd, Palm Beach, FL 33480, hereinafter, the "PREMISES," a residence and club known as "Mar-a-Lago," further described in Attachment A, were reported by NARA to contain, among other things, highly classified documents intermingled with other records.

2. After an initial review of the NARA Referral, the Federal Bureau of Investigation (FBI) opened a criminal investigation to, among other things, determine how the documents with

classification markings and records were removed from the White House (or any other authorized location(s) for the storage of classified materials) and came to be stored at the PREMISES; determine whether the storage location(s) at the PREMISES were authorized locations for the storage of classified information; determine whether any additional classified documents or records may have been stored in an unauthorized location at the PREMISES or another unknown location, and whether they remain at any such location; and identify any person(s) who may have removed or retained classified information without authorization and/or in an unauthorized space.

3. The FBI's investigation has established that documents bearing classification markings, which appear to contain National Defense Information (NDI), were among the materials contained in the FIFTEEN BOXES and were stored at the PREMISES in an unauthorized location. Since the FIFTEEN BOXES were provided to NARA, additional documents bearing classification markings, which appear to contain NDI and were stored at the PREMISES in an unauthorized location, have been produced to the government in response to a grand jury subpoena directed to FPOTUS's post-presidential office and seeking documents containing classification markings stored at the PREMISES and otherwise under FPOTUS's control. Further, there is probable cause to believe that additional documents that contain classified NDI or that are Presidential records subject to record retention requirements currently remain at the PREMISES. There is also probable cause to believe that evidence of obstruction will be found at the PREMISES.

4. I am a Special Agent with the FBI assigned to the Washington Field Office [redacted]. During this time, I have received training at the FBI Academy located at Quantico, Virginia, specific to counterintelligence and espionage investigations. [redacted].

Based on my experience and training, I am familiar with efforts used to unlawfully collect, retain, and disseminate sensitive government information, including classified NDI.

5. I make this affidavit in support of an application under Rule 41 of the Federal Rules of Criminal Procedure for a warrant to search the premises known as 1100 S Ocean Blvd, Palm Beach, FL 33480, the "PREMISES," as further described in Attachment A, for the things described in Attachment B.

6. Based upon the following facts, there is probable cause to believe that the locations to be searched at the PREMISES contain evidence, contraband, fruits of crime, or other items illegally possessed in violation of 18 U.S.C. §§ 793(e), 1519, or 2071.

SOURCE OF EVIDENCE

7. The facts set forth in this affidavit are based on my personal knowledge, knowledge obtained during my participation in this investigation, and information obtained from other FBI and U.S. Government personnel. Because this affidavit is submitted for the limited purpose of establishing probable cause in support of the application for a search warrant, it does not set forth each and every fact that I, or others, have learned during the course of this investigation.

STATUTORY AUTHORITY AND DEFINITIONS

8. Under 18 U.S.C. § 793(e), "[w]hoever having unauthorized possession of, access to, or control over any document . . . or information relating to the national defense which information the possessor has reason to believe could be used to the injury of the United States or to the advantage of any foreign nation, willfully communicates, delivers, transmits or causes to be communicated, delivered, or transmitted" or attempts to do or causes the same "to any person not entitled to receive it, or willfully retains the same and fails to deliver it to the officer or employee

of the United States entitled to receive it" shall be fined or imprisoned not more than ten years, or both.

9. Under Executive Order 13526, information in any form may be classified if it: (1) is owned by, produced by or for, or is under the control of the United States Government; (2) falls within one or more of the categories set forth in the Executive Order [Top Secret, Secret, and Confidential]; and (3) is classified by an original classification authority who determines that its unauthorized disclosure reasonably could be expected to result in damage to the national security.

10. Where such unauthorized disclosure could reasonably result in damage to the national security, the information may be classified as "Confidential" and must be properly safeguarded. Where such unauthorized disclosure could reasonably result in serious damage to the national security, the information may be classified as "Secret" and must be properly safeguarded. Where such unauthorized disclosure could reasonably result in exceptionally grave damage to the national security, the information may be classified as "Top Secret" and must be properly safeguarded.

11. Sensitive Compartmented Information (SCI) means classified information concerning or derived from intelligence sources, methods, or analytical processes, which is required to be handled within formal access control systems.

12. Special Intelligence, or "SI," is an SCI control system designed to protect technical and intelligence information derived from the monitoring of foreign communications signals by other than the intended recipients. The SI control system protects SI-derived information and information relating to SI activities, capabilities, techniques, processes, and procedures.

13. HUMINT Control System, or "HCS," is an SCI control system designed to protect intelligence information derived from clandestine human sources, commonly referred to as

"human intelligence." The HCS control system protects human intelligence-derived information and information relating to human intelligence activities, capabilities, techniques, processes, and procedures.

14. Foreign Intelligence Surveillance Act, or "FISA," is a dissemination control designed to protect intelligence information derived from the collection of information authorized under the Foreign Intelligence Surveillance Act by the Foreign Intelligence Surveillance Court, or "FISC."

15. Classified information may be marked as "Not Releasable to Foreign Nationals/Governments/US Citizens," abbreviated "NOFORN," to indicate information that may not be released in any form to foreign governments, foreign nationals, foreign organizations, or non-U.S. citizens without permission of the originator.

16. Classified information may be marked as "Originator Controlled," abbreviated "ORCON." This marking indicates that dissemination beyond pre-approved U.S. entities requires originator approval.

17. Classified information of any designation may be shared only with persons determined by an appropriate United States Government official to be eligible for access, and who possess a "need to know." Among other requirements, in order for a person to obtain a security clearance allowing that person access to classified United States Government information, that person is required to and must agree to properly protect classified information by not disclosing such information to persons not entitled to receive it, by not unlawfully removing classified information from authorized storage facilities, and by not storing classified information in unauthorized locations. If a person is not eligible to receive classified information, classified information may not be disclosed to that person. In order for a foreign government to receive

access to classified information, the originating United States agency must determine that such release is appropriate.

18. Pursuant to Executive Order 13526, classified information contained on automated information systems, including networks and telecommunications systems, that collect, create, communicate, compute, disseminate, process, or store classified information must be maintained in a manner that: (1) prevents access by unauthorized persons; and (2) ensures the integrity of the information.

19. 32 C.F.R. Parts 2001 and 2003 regulate the handling of classified information. Specifically, 32 C.F.R. § 2001.43, titled "Storage," regulates the physical protection of classified information. This section prescribes that Secret and Top Secret information "shall be stored in a [General Services Administration]-approved security container, a vault built to Federal Standard (FHD STD) 832, or an open storage area constructed in accordance with § 2001.53." It also requires periodic inspection of the container and the use of an Intrusion Detection System, among other things.

20. Under 18 U.S.C. § 1519:

> Whoever knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States or any case filed under title 11, or in relation to or contemplation of any such matter or case, shall be fined under this title, imprisoned not more than 20 years, or both.

21. Under 18 U.S.C. § 2071:

> (a) Whoever willfully and unlawfully conceals, removes, mutilates, obliterates, or destroys, or attempts to do so, or, with intent to do so takes and carries away any record, proceeding, map, book, paper, document, or other thing, filed or deposited with any clerk or officer of any court of the United States, or in any public office, or with any judicial or public officer of the United States, shall be fined under this title or imprisoned not more than three years, or both.

(b) Whoever, having the custody of any such record, proceeding, map, book, document, paper, or other thing, willfully and unlawfully conceals, removes, mutilates, obliterates, falsifies, or destroys the same, shall be fined under this title or imprisoned not more than three years, or both; and shall forfeit his office and be disqualified from holding any office under the United States. As used in this subsection, the term "office" does not include the office held by any person as a retired officer of the Armed Forces of the United States.

22. Under the PRA, 44 U.S.C. § 2201:

(2) The term "Presidential records" means documentary materials, or any reasonably segregable portion thereof, created or received by the President, the President's immediate staff, or a unit or individual of the Executive Office of the President whose function is to advise or assist the President, in the course of conducting activities which relate to or have an effect upon the carrying out of the constitutional, statutory, or other official or ceremonial duties of the President. Such term—

(A) includes any documentary materials relating to the political activities of the President or members of the President's staff, but only if such activities relate to or have a direct effect upon the carrying out of constitutional, statutory, or other official or ceremonial duties of the President; but

(B) does not include any documentary materials that are (i) official records of an agency (as defined in section 552(e) of title 5, United States Code; (ii) personal records; (iii) stocks of publications and stationery; or (iv) extra copies of documents produced only for convenience of reference, when such copies are clearly so identified.

23. Under 44 U.S.C. § 3301(a), government "records" are defined as:

all recorded information, regardless of form or characteristics, made or received by a Federal agency under Federal law or in connection with the transaction of public business and preserved or appropriate for preservation by that agency or its legitimate successor as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the United States Government or because of the informational value of data in them.

PROBABLE CAUSE

NARA Referral

24. On February 9, 2022, the Special Agent in Charge of NARA's Office of the

Inspector General sent the NARA Referral via email to DOJ. The NARA Referral stated that according to NARA's White House Liaison Division Director, a preliminary review of the FIFTEEN BOXES indicated that they contained "newspapers, magazines, printed news articles, photos, miscellaneous print-outs, notes, presidential correspondence, personal and post-presidential records, and 'a lot of classified records.' Of most significant concern was that highly classified records were unfoldered, intermixed with other records, and otherwise unproperly [*sic*] identified."

25. On February 18, 2022, the Archivist of the United States, chief administrator for NARA, stated in a letter to Congress's Committee on Oversight and Reform Chairwoman The Honorable Carolyn B. Maloney, "NARA had ongoing communications with the representatives of former President Trump throughout 2021, which resulted in the transfer of 15 boxes to NARA in January 2022 . . . . NARA has identified items marked as classified national security information within the boxes." The letter also stated that, "[b]ecause NARA identified classified information in the boxes, NARA staff has been in communication with the Department of Justice." The letter was made publicly available at the following uniform resource locator (URL): https://www.archives.gov/files/foia/ferriero-response-to-02.09.2022-maloney-letter.02.18.2022.pdf. On February 18, 2022, the same day, the Save America Political Action Committee (PAC) posted the following statement on behalf of FPOTUS: "The National Archives did not 'find' anything, they were given, upon request, Presidential Records in an ordinary and routine process to ensure the preservation of my legacy and in accordance with the Presidential Records Act . . . ." An image of this statement is below.

SAVE AMERICA
PRESIDENT DONALD J. TRUMP

Statement by Donald J. Trump, 45th President of the United States of America

The National Archives did not "find" anything, they were given, upon request, Presidential Records in an ordinary and routine process to ensure the preservation of my legacy and in accordance with the Presidential Records Act. If this was anyone but "Trump" there would be no story here. Instead, the Democrats are in search of their next Scam. The Russia, Russia, Russia Hoax turned out to be a Democrat inspired fake story to help crooked Hillary Clinton. Impeachment Hoax #1, Impeachment Hoax #2, and so much more, has all been a Hoax. The Fake News is making it seem like me, as the President of the United States, was working in a filing room. No. I was busy destroying ISIS, building the greatest economy America had ever seen, brokering Peace deals, making sure Russia didn't attack Ukraine, making sure China didn't take over Taiwan, making sure there was no inflation, creating an energy independent country, rebuilding our military and Law enforcement, saving our Second Amendment, protecting our Border, and cutting taxes. Now, Russia is invading Ukraine, our economy is being destroyed, our Border is once again overrun, and the mandate continues. Instead of focusing on America, the media just wants to talk about their plan to "get" Trump. The people won't stand for it any longer!

[redacted]

26. [redacted]

[redacted]

27. [redacted]

[redacted]

[redacted]

28. [redacted]

29. [redacted]

[redacted]

Boxes Containing Documents Were Transported from the White House to Mar-a-Lago

30. According to a CBS Miami article titled "Moving Trucks Spotted At Mar-a-Lago," published Monday, January 18, 2021, at least two moving trucks were observed at the PREMISES on January 18, 2021. [redacted]

31. [redacted]

32. [redacted]

[redacted]

[redacted]

33. [redacted]

[redacted]

34. [redacted]

[redacted]

[redacted]

35. [redacted]

36. [redacted]

37. [redacted]

Provision of the Fifteen Boxes to NARA

38. [redacted]

[redacted]

39. On or about May 6, 2021, NARA made a request for the missing PRA records and continued to make requests until approximately late December 2021 when NARA was informed twelve boxes were found and ready for retrieval at the PREMISES. [redacted]

1 [redacted]

[redacted]

40. [redacted]

41. [redacted]

42. [redacted]

43. [redacted]

44. [redacted]

[redacted]

45. [redacted]

[redacted]

46. [redacted]

[redacted]

The FIFTEEN BOXES Provided to NARA Contain Classified Information

47. From May 16-18, 2022, FBI agents conducted a preliminary review of the FIFTEEN BOXES provided to NARA and identified documents with classification markings in fourteen of the FIFTEEN BOXES. A preliminary triage of the documents with classification markings revealed the following approximate numbers: 184 unique documents bearing classification markings, including 67 documents marked as CONFIDENTIAL, 92 documents marked as SECRET, and 25 documents marked as TOP SECRET. Further, the FBI agents observed markings reflecting the following compartments/dissemination controls: HCS, FISA, ORCON, NOFORN, and SI. Based on my training and experience, I know that documents classified at these levels typically contain NDI. Several of the documents also contained what appears to be FPOTUS's handwritten notes.

48. [redacted]

49. [redacted]

[redacted]

50. [redacted]

Grand Jury Subpoena, Related Correspondence, and Production of Additional Classified Documents

51. DOJ has advised me that, on May 11, 2022, an attorney representing FPOTUS, "FPOTUS COUNSEL 1," agreed to accept service of a grand jury subpoena from a grand jury sitting in the District of Columbia sent to him via email by one of the prosecutors handling this matter for DOJ, "DOJ COUNSEL." The subpoena was directed to the custodian of records for the Office of Donald J. Trump, and it requested the following materials:

> Any and all documents or writings in the custody or control of Donald J. Trump and/or the Office of Donald J. Trump bearing classification markings, including but not limited to the following: Top Secret, Secret, Confidential, Top Secret/SI-G/NOFORN/ORCON, Top Secret/SI-G/NOFORN, Top Secret/HCS-O/NOFORN/ORCON, Top Secret/HCS-O/NOFORN, Top Secret/HCS-P/NOFORN/ORCON, Top Secret/HCS-P/NOFORN, Top Secret/TK/NOFORN/ORCON, Top Secret/TK/NOFORN, Secret/NOFORN, Confidential/NOFORN, TS, TS/SAP, TS/SI-G/NF/OC, TS/SI-G/NF, TS/HCS-O/NF/OC, TS/HCS-O/NF, TS/HCS-P/NF/OC, TS/HCS-P/NF, TS/HCS-P/SI-G, TS/HCS-P/SI/TK, TS/TK/NF/OC, TS/TK/NF, S/NF, S/FRD, S/NATO, S/SI, C, and C/NF.

The return date of the subpoena was May 24, 2022. DOJ COUNSEL also sent FPOTUS COUNSEL 1 a letter that permitted alternative compliance with the subpoena by "providing any responsive documents to the FBI at the place of their location" and by providing from the custodian a "sworn certification that the documents represent all responsive records." The letter further stated that if no responsive documents existed, the custodian should provide a sworn certification to that effect.

52. On May 25, 2022, while negotiating for an extension of the subpoena, FPOTUS COUNSEL 1 sent two letters to DOJ COUNSEL. In the second such letter, which is attached as Exhibit 1, FPOTUS COUNSEL 1 asked DOJ to consider a few "principles," which include FPOTUS COUNSEL 1's claim that a President has absolute authority to declassify documents. In this letter, FPOTUS COUNSEL 1 requested, among other things, that "DOJ provide this letter to any judicial officer who is asked to rule on any motion pertaining to this investigation, or on any application made in connection with any investigative request concerning this investigation."

53. I am aware of an article published in *Breitbart* on May 5, 2022, available at https://www.breitbart.com/politics/2022/05/05/documents-mar-a-lago-marked-classified-were-already-declassified-kash-patel-says/, which states that Kash Patel, who is described as a former top FPOTUS administration official, characterized as "misleading" reports in other news organizations that NARA had found classified materials among records that FPOTUS provided to NARA from Mar-a-Lago. Patel alleged that such reports were misleading because FPOTUS had declassified the materials at issue. [redacted]

54. [redacted]

[redacted]

55. After an extension was granted for compliance with the subpoena, on the evening of June 2, 2022, FPOTUS COUNSEL 1 contacted DOJ COUNSEL and requested that FBI agents meet him the following day to pick up responsive documents. On June 3, 2022, three FBI agents and DOJ COUNSEL arrived at the PREMISES to accept receipt of the materials. In addition to FPOTUS COUNSEL 1, another individual, hereinafter "INDIVIDUAL 2," was also present as the custodian of records for FPOTUS's post-presidential office. The production included a single Redweld envelope, wrapped in tape, containing documents. FPOTUS COUNSEL 1 relayed that the documents in the Redweld envelope were found during a review of the boxes located in the STORAGE ROOM. INDIVIDUAL 2 provided a Certification Letter, signed by INDIVIDUAL 2, which stated the following:

> Based upon the information that has been provided to me, I am authorized to certify, on behalf of the Office of Donald J. Trump, the following: a. A diligent search was conducted of the boxes that were moved from the White House to Florida; b. This search was conducted after receipt of the subpoena, in order to locate any and all documents that are responsive to the subpoena; c. Any and all responsive documents accompany this certification; and d. No copy, written notation, or reproduction of any kind was retained as to any responsive document.

56. During receipt of the production, FPOTUS COUNSEL 1 stated he was advised all

the records that came from the White House were stored in one location within Mar-a-Lago, the STORAGE ROOM, and the boxes of records in the STORAGE ROOM were "the remaining repository" of records from the White House. FPOTUS COUNSEL 1 further stated he was not advised there were any records in any private office space or other location in Mar-a-Lago. The agents and DOJ COUNSEL were permitted to see the STORAGE ROOM and observed that approximately fifty to fifty-five boxes remained in the STORAGE ROOM. [redacted] Other items were also present in the STORAGE ROOM, including a coat rack with suit jackets, as well as interior décor items such as wall art and frames.

57. [redacted]

58. A preliminary review of the documents contained in the Redweld envelope produced pursuant to the grand jury subpoena revealed the following approximate numbers: 38 unique documents bearing classification markings, including 5 documents marked as CONFIDENTIAL, 16 documents marked as SECRET, and 17 documents marked as TOP SECRET. Further, the FBI agents observed markings reflecting the following caveats/compartments, among others: HCS, SI, and FISA. [redacted] Multiple documents also

contained what appears to be FPOTUS's handwritten notes.

59. Notably, although the FIFTEEN BOXES provided to NARA contained approximately 184 unique documents with classification markings, only approximately 38 unique documents with classification markings were produced from the remaining FPOTUS BOXES.

60. When producing the documents, neither FPOTUS COUNSEL 1 nor INDIVIDUAL 2 asserted that FPOTUS had declassified the documents.[2] The documents being in a Redweld envelope wrapped in tape appears to be consistent with an effort to handle the documents as if they were still classified.

61. On June 8, 2022, DOJ COUNSEL sent FPOTUS COUNSEL 1 a letter, which reiterated that the PREMISES are not authorized to store classified information and requested the preservation of the STORAGE ROOM and boxes that had been moved from the White House to the PREMISES. Specifically, the letter stated in relevant part:

> As I previously indicated to you, Mar-a-Lago does not include a secure location authorized for the storage of classified information. As such, it appears that since the time classified documents (the ones recently provided and any and all others) were removed from the secure facilities at the White House and moved to Mar-a-Lago on or around January 20, 2021, they have not been handled in an appropriate manner or stored in an appropriate location. Accordingly, we ask that the room at Mar-a-Lago where the documents had been stored be secured and that all of the boxes that were moved from the White House to Mar-a-Lago (along with any other items in that room) be preserved in that room in their current condition until further notice.

[2] 18 U.S.C. § 793(e) does not use the term "classified information," but rather criminalizes the unlawful retention of "information relating to the national defense." The statute does not define "information related to the national defense," but courts have construed it broadly. *See Gorin v. United States*, 312 U.S. 19, 28 (1941) (holding that the phrase "information relating to the national defense" as used in the Espionage Act is a "generic concept of broad connotations, referring to the military and naval establishments and the related activities of national preparedness"). In addition, the information must be "closely held" by the U.S. government. *See United States v. Squillacote*, 221 F.3d 542, 579 (4th Cir. 2000) ("[I]nformation made public by the government as well as information never protected by the government is not national defense information."); *United States v. Morison*, 844 F.2d 1057, 1071-72 (4th Cir. 1988). Certain courts have also held that the disclosure of the documents must be potentially damaging to the United States. *See Morison*, 844 F.2d at 1071-72.

On June 9, 2022, FPOTUS COUNSEL 1 sent an email to DOJ COUNSEL, stating, "I write to acknowledge receipt of this letter."

[redacted]

62. DOJ COUNSEL has advised me that on or about June 22, 2022, counsel for the Trump Organization, a group of business entities associated with FPOTUS, confirmed that the Trump Organization maintains security cameras in the vicinity of the STORAGE ROOM and that on June 24, 2022, counsel for the Trump Organization agreed to accept service of a grand jury subpoena for footage from those cameras.

63. The subpoena was served on counsel on June 24, 2022, directed to the Custodian of Records for the Trump Organization, and sought:

> Any and all surveillance records, videos, images, photographs, and/or CCTV from internal cameras located on ground floor (basement) [redacted] on the Mar-a-Lago property located at 1100 S Ocean Blvd., Palm Beach, FL 33480 from the time period of January 10, 2022 to present.

64. On July 6, 2022, in response to this subpoena, representatives of the Trump Organization provided a hard drive to FBI agents. [redacted]

[redacted]

65. [redacted]

66. [redacted]

[redacted]

[redacted]

67. [redacted]

[redacted]

68. [redacted]

[redacted]

69. [redacted]

[redacted]

[redacted]

There is Probable Cause to Believe That Documents Containing Classified NDI and Presidential Records Remain at the Premises

70. As explained above, the FPOTUS BOXES contained numerous documents with classification markings, both in the FIFTEEN BOXES and in the remaining FPOTUS BOXES. As also explained above, the classified documents provided to the government in a Redweld envelope pursuant to the subpoena were represented to have been stored in boxes located in the STORAGE ROOM, [redacted]

71. [redacted]

[redacted]

72. [redacted]

[redacted]

73. [redacted]

[redacted]

[redacted]

74. [redacted]

[redacted]

75. [redacted]

[redacted]

76. [redacted]

[redacted]

[redacted]

77. Based upon this investigation, I believe that the STORAGE ROOM, FPOTUS's residential suite, Pine Hall, the "45 Office," and other spaces within the PREMISES are not currently authorized locations for the storage of classified information or NDI. Similarly, based upon this investigation, I do not believe that any spaces within the PREMISES have been authorized for the storage of classified information at least since the end of FPOTUS's Presidential Administration on January 20, 2021.

78. As described above, evidence of the SUBJECT OFFENSES has been stored in multiple locations at the PREMISES. [redacted]

Accordingly, this affidavit seeks authorization to search the "45 Office" and all storage rooms and

any other rooms or locations where boxes or records may be stored within the PREMISES, as further described in Attachment A. The PREMISES is currently closed to club members for the summer; however, as specified in Attachment A, if at the time of the search, there are areas of the PREMISES being occupied, rented, or used by third parties, and not otherwise used or available to be used by FPOTUS and his staff, the search would not include such areas.

CONCLUSION

79. Based on the foregoing facts and circumstances, I submit that probable cause exists to believe that evidence, contraband, fruits of crime, or other items illegally possessed in violation 18 U.S.C. §§ 793(e), 2071, or 1519 will be found at the PREMISES. Further, I submit that this affidavit supports probable cause for a warrant to search the PREMISES described in Attachment A and seize the items described in Attachment B.

REQUEST FOR SEALING

80. It is respectfully requested that this Court issue an order sealing, until further order of the Court, all papers submitted in support of this application, including the application and search warrant. I believe that sealing this document is necessary because the items and information to be seized are relevant to an ongoing investigation and the FBI has not yet identified all potential criminal confederates nor located all evidence related to its investigation. Premature disclosure of the contents of this affidavit and related documents may have a significant and negative impact on the continuing investigation and may severely jeopardize its effectiveness by allowing criminal parties an opportunity to flee, destroy evidence (stored electronically and otherwise), change patterns of behavior, and notify criminal confederates.

SEARCH PROCEDURES FOR HANDLING POTENTIAL ATTORNEY-CLIENT PRIVILEGED INFORMATION

The following procedures will be followed at the time of the search in order to protect against disclosures of attorney-client privileged material:

81. These procedures will be executed by: (a) law enforcement personnel conducting this investigation (the "Case Team"); and (b) law enforcement personnel not participating in the investigation of the matter, who will search the "45 Office" and be available to assist in the event that a procedure involving potentially attorney-client privileged information is required (the "Privilege Review Team").

82. The Case Team will be responsible for searching the **TARGET PREMISES**. However, the Privilege Review Team will search the "45 Office" and conduct a review of the seized materials from the "45 Office" to identify and segregate documents or data containing potentially attorney-client privileged information.

83. If the Privilege Review Team determines the documents or data are not potentially attorney-client privileged, they will be provided to the law-enforcement personnel assigned to the investigation. If at any point the law-enforcement personnel assigned to the investigation subsequently identify any data or documents that they consider may be potentially attorney-client privileged, they will cease the review of such identified data or documents and refer the materials to the Privilege Review Team for further review by the Privilege Review Team.

84. If the Privilege Review Team determines that documents are potentially attorney-client privileged or merit further consideration in that regard, a Privilege Review Team attorney may do any of the following: (a) apply *ex parte* to the court for a determination whether or not the documents contain attorney-client privileged material; (b) defer seeking court intervention and

continue to keep the documents inaccessible to law-enforcement personnel assigned to the investigation; or (c) disclose the documents to the potential privilege holder, request the privilege holder to state whether the potential privilege holder asserts attorney-client privilege as to any documents, including requesting a particularized privilege log, and seek a ruling from the court regarding any attorney-client privilege claims as to which the Privilege Review Team and the privilege-holder cannot reach agreement.

Respectfully submitted,

[redacted]
Special Agent
Federal Bureau of Investigation

Subscribed and sworn before me by telephone (WhatsApp) or other reliable electronic means this 5 day of August, 2022:

HON. BRUCE E. REINHART
UNITED STATES MAGISTRATE JUDGE

EXHIBIT 1

SILVERMAN THOMPSON
Silverman Thompson Slutkin White

ATTORNEYS AT LAW

A Limited Liability Company
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Baltimore, Maryland 21202
Telephone 410.385.2225
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May 25, 2022

Via Electronic Mail

Jay I. Bratt, Esquire
Chief
Counterintelligence & Export Control Section
National Security Division
U.S. Department of Justice
950 Pennsylvania, Avenue, N.W.
Washington, D.C. 20530

Re: Presidential Records Investigation

Dear Jay:

I write on behalf of President Donald J. Trump regarding the above-referenced matter.

Public trust in the government is low. At such times, adherence to the rules and long-standing policies is essential. President Donald J. Trump is a leader of the Republican Party. The Department of Justice (DOJ), as part of the Executive Branch, is under the control of a President from the opposite party. It is critical, given that dynamic, that every effort is made to ensure that actions by DOJ that may touch upon the former President, or his close associates, do not involve politics.

There have been public reports about an investigation by DOJ into Presidential Records purportedly marked as classified among materials that were once in the White House and unknowingly included among the boxes brought to Mar-a-Lago by the movers. It is important to emphasize that when a request was made for the documents by the National Archives and Records Administration (NARA), President Trump readily and voluntarily agreed to their transfer to NARA. The communications regarding the transfer of boxes to NARA were friendly, open, and straightforward. President Trump voluntarily ordered that the boxes be provided to NARA. No legal objection was asserted about the transfer. No concerns were raised about the contents of the boxes. It was a voluntary and open process.

Unfortunately, the good faith demonstrated by President Trump was not matched once the boxes arrived at NARA. Leaks followed. And, once DOJ got involved, the leaks continued. Leaks about any investigation are concerning. Leaks about an investigation that involve the residence of a former President who is still active on the national political scene are particularly troubling.

It is important to note a few bedrock principles:

(1) A President Has Absolute Authority To Declassify Documents.

Under the U.S. Constitution, the President is vested with the highest level of authority when it comes to the classification and declassification of documents. *See* U.S. Const., Art. II, § 2 ("The President [is] Commander in Chief of the Army and Navy of the United States[.]"). His constitutionally-based authority regarding the classification and declassification of documents is unfettered. *See Navy v. Egan*, 484 U.S. 518, 527 (1988) ("[The President's] authority to classify and control access to information bearing on national security . . . flows primarily from this constitutional investment of power in the President and exists quite apart from any explicit congressional grant.").

(2) Presidential Actions Involving Classified Documents Are Not Subject To Criminal Sanction.

Any attempt to impose criminal liability on a President or former President that involves his actions with respect to documents marked classified would implicate grave constitutional separation-of-powers issues. Beyond that, the primary criminal statute that governs the unauthorized removal and retention of classified documents or material *does not apply* to the President. That statute provides, in pertinent part, as follows:

> Whoever, being an officer, employee, contractor, or consultant of the United States, and, by virtue of his office, employment, position, or contract, becomes possessed of documents or materials containing classified information of the United States, knowingly removes such documents or materials without authority and with the intent to retain such documents or materials at an unauthorized location shall be fined under this title or imprisoned for not more than five years, or both.

18 U.S.C. § 1924(a). An element of this offense, which the government must prove beyond a reasonable doubt, is that the accused is "an officer, employee, contractor, or consultant of the United States." The President is none of these. *See Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 497–98 (2010) (citing U.S. Const., Art. II, § 2, cl. 2) ("The people do not vote for the 'Officers of the United States.'"); *see also Melcher v. Fed. Open Mkt. Comm.*, 644 F. Supp. 510, 518–19 (D.D.C. 1986), *aff'd*, 836 F.2d 561 (D.C. Cir. 1987) ("[a]n officer of the United States can only be appointed by the President, by and with the advice and consent of the Senate, or by a court of law, or the head of a department. A person who does not derive his position from one of these sources is not an officer of the United States in the sense of the Constitution."). Thus, the statute does not apply to acts by a President.

(3) DOJ Must Be Insulated From Political Influence.

According to the Inspector General of DOJ, one of the top challenges facing the Department is the public perception that DOJ is influenced by politics. The report found that "[o]ne important strategy that can build public trust in the Department is to ensure adherence to policies and procedures designed to protect DOJ from accusations of political influence or partial application of the law." *See* https://oig.justice.gov/reports/top-management-and-performance-challenges-facing-department-justice-2021 (last visited May 25, 2022). We request that DOJ adhere to long-standing policies and procedures regarding communications between DOJ and the White House regarding pending investigative matters which are designed to prevent political influence in DOJ decision-making.

(4) DOJ Must Be Candid With Judges And Present Exculpatory Evidence.

Long-standing DOJ policy requires that DOJ attorneys be candid in representations made to judges. Pursuant to those policies, we request that DOJ provide this letter to any judicial officer who is asked to rule on any motion pertaining to this investigation, or on any application made in connection with any investigative request concerning this investigation.

The official policy of DOJ further requires that prosecutors present exculpatory evidence to a grand jury. Pursuant to that policy, we request that DOJ provide this letter to any grand jury considering evidence in connection with this matter, or any grand jury asked to issue a subpoena for testimony or documents in connection with this matter.

Thank you for your attention to this request.

With best regards,

M. Evan Corcoran

cc: Matthew G. Olsen
Assistant Attorney General
National Security Division
Via Electronic Mail

ATTACHMENT A

Property to be searched

The premises to be searched, 1100 S Ocean Blvd, Palm Beach, FL 33480, is further described as a resort, club, and residence located near the intersection of Southern Blvd and S Ocean Blvd. It is described as a mansion with approximately 58 bedrooms, 33 bathrooms, on a 17-acre estate. The locations to be searched include the "45 Office," all storage rooms, and all other rooms or areas within the premises used or available to be used by FPOTUS and his staff and in which boxes or documents could be stored, including all structures or buildings on the estate. It does not include areas currently (i.e., at the time of the search) being occupied, rented, or used by third parties (such as Mar-a-Largo Members) and not otherwise used or available to be used by FPOTUS and his staff, such as private guest suites.

ATTACHMENT B

Property to be seized

All physical documents and records constituting evidence, contraband, fruits of crime, or other items illegally possessed in violation of 18 U.S.C. §§ 793, 2071, or 1519, including the following:

a. Any physical documents with classification markings, along with any containers/boxes (including any other contents) in which such documents are located, as well as any other containers/boxes that are collectively stored or found together with the aforementioned documents and containers/boxes;

b. Information, including communications in any form, regarding the retrieval, storage, or transmission of national defense information or classified material;

c. Any government and/or Presidential Records created between January 20, 2017, and January 20, 2021; or

d. Any evidence of the knowing alteration, destruction, or concealment of any government and/or Presidential Records, or of any documents with classification markings.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 22-MJ-8332-BER

IN RE SEALED SEARCH WARRANT FILED UNDER SEAL

_____/

NOTICE OF FILING OF REDACTED DOCUMENTS

The United States hereby gives notice that it is filing the following document, which is a redacted version of material previously filed in this case number under seal:

- The search warrant (not including the affidavit) signed and approved by the Court on August 5, 2022, including Attachments A and B;
- The Property Receipt listing items seized pursuant to the search, filed with the Court on August 11, 2022.

JUAN ANTONIO GONZALEZ
UNITED STATES ATTORNEY
Florida Bar No. 897388
99 NE 4th Street, 8th Floor
Miami, Fl 33132
Tel: 305-961-9001
Email: juan.antonio.gonzalez@usdoj.gov

AO 93 (Rev. 11/13) Search and Seizure Warrant

UNITED STATES DISTRICT COURT

for the

Southern District of Florida

In the Matter of the Search of *(Briefly describe the property to be searched or identify the person by name and address)* the Premises Located at 1100 S. Ocean Blvd., Palm Beach, FL 33480, as further described in Attachment A	)	Case No. 22-mj-8332-BER

SEARCH AND SEIZURE WARRANT

To: Any authorized law enforcement officer

An application by a federal law enforcement officer or an attorney for the government requests the search of the following person or property located in the Southern District of Florida
(identify the person or describe the property to be searched and give its location):

See Attachment A

I find that the affidavit(s), or any recorded testimony, establish probable cause to search and seize the person or property described above, and that such search will reveal *(identify the person or describe the property to be seized)*:

See Attachment B

YOU ARE COMMANDED to execute this warrant on or before August 19, 2022 *(not to exceed 14 days)*
☑ in the daytime 6:00 a.m. to 10:00 p.m. ☐ at any time in the day or night because good cause has been established.

Unless delayed notice is authorized below, you must give a copy of the warrant and a receipt for the property taken to the person from whom, or from whose premises, the property was taken, or leave the copy and receipt at the place where the property was taken.

The officer executing this warrant, or an officer present during the execution of the warrant, must prepare an inventory as required by law and promptly return this warrant and inventory to Duty Magistrate .
(United States Magistrate Judge)

☐ Pursuant to 18 U.S.C. § 3103a(b), I find that immediate notification may have an adverse result listed in 18 U.S.C. § 2705 (except for delay of trial), and authorize the officer executing this warrant to delay notice to the person who, or whose property, will be searched or seized *(check the appropriate box)*
☐ for ____ days *(not to exceed 30)* ☐ until, the facts justifying, the later specific date of ____ .

Date and time issued: 8/5/22 12:12 pm

Bruce Reinhart
Judge's signature

City and state: West Palm Beach, FL

Hon. Bruce Reinhart, U.S. Magistrate Judge
Printed name and title

ATTACHMENT A

Property to be searched

The premises to be searched, 1100 S Ocean Blvd, Palm Beach, FL 33480, is further described as a resort, club, and residence located near the intersection of Southern Blvd and S Ocean Blvd. It is described as a mansion with approximately 58 bedrooms, 33 bathrooms, on a 17-acre estate. The locations to be searched include the "45 Office," all storage rooms, and all other rooms or areas within the premises used or available to be used by FPOTUS and his staff and in which boxes or documents could be stored, including all structures or buildings on the estate. It does not include areas currently (i.e., at the time of the search) being occupied, rented, or used by third parties (such as Mar-a-Largo Members) and not otherwise used or available to be used by FPOTUS and his staff, such as private guest suites.

ATTACHMENT B

Property to be seized

All physical documents and records constituting evidence, contraband, fruits of crime, or other items illegally possessed in violation of 18 U.S.C. §§ 793, 2071, or 1519, including the following:

a. Any physical documents with classification markings, along with any containers/boxes (including any other contents) in which such documents are located, as well as any other containers/boxes that are collectively stored or found together with the aforementioned documents and containers/boxes;

b. Information, including communications in any form, regarding the retrieval, storage, or transmission of national defense information or classified material;

c. Any government and/or Presidential Records created between January 20, 2017, and January 20, 2021; or

d. Any evidence of the knowing alteration, destruction, or concealment of any government and/or Presidential Records, or of any documents with classification markings.

FD-597 (Rev. 4-13-2016) Page 1 of 1

UNITED STATES DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF INVESTIGATION
RECEIPT FOR PROPERTY

Case ID: WF-[redacted]

On (date) 8/8/2022 item(s) listed below were:

- ☒ Collected/Seized
- ☐ Received From
- ☐ Returned To
- ☐ Released To

(Name) Mar-A-Lago

(Street Address) 1100 S OCEAN BLVD

(City) PALM BEACH, FL 33480

Description of Item(s):

4 - Documents

29 - Box labeled A-14

30 - Box Labeled A-26

31 - Box Labeled A-43

32 - Box Labeled A-13

33 - Box Labeled A-33

Received By: Christina Bobb (signature)

Received From: [redacted] (signature)

Printed Name/Title: Christina Bobb attorney

Printed Name/Title: [redacted] / SSA

6:19 pm on 8/8/22

UNITED STATES DEPARTMENT OF JUSTICE

FEDERAL BUREAU OF INVESTIGATION

RECEIPT FOR PROPERTY

Case ID: WF-[redacted]

On (date) 8/8/2022 item(s) listed below were:

- ☒ Collected/Seized
- ☐ Received From
- ☐ Returned To
- ☐ Released To

(Name) Mar-A-Lago

(Street Address) 1100 S OCEAN BLVD

(City) PALM BEACH, FL 33480

Description of Item(s):

1 - Executive Grant of Clemency re: Roger Jason Stone, Jr.

1A - Info re: President of France

2 - Leatherbound box of documents

2A - Various classified/TS/SCI documents

3 - Potential Presidential Record

5 - Binder of photos

6 - Binder of photos

7 - Handwritten note

8 - Box labeled A-1

9 - Box labeled A-12

10 - Box Labeled A-15

10A - Miscellaneous Secret Documents

11 - Box Labeled A-16

11A - Miscellanous Top Secret Documents

12 - Box labeled A-17

13 - Box labeled A-18

13A - Miscellaneous Top Secret Documents

14 - Box labeled A-27

14-A - Miscellaneous Confidential Documents

FD-597 (Rev. 4-13-2015)

UNITED STATES DEPARTMENT OF JUSTICE

FEDERAL BUREAU OF INVESTIGATION

RECEIPT FOR PROPERTY

15 - Box Labeled A-28

15A - Miscellaneous Secret Documents

16 - Box labeled A-30

17 - Box labeled A-32

18 - Box labeled A-35

19 - Box labeled A-23

19A - Confidential Document

20 - Box Labeled A-22

21 - Box labeled A-24

22 - Box Labeled A-34

23 - Box Labeled A-39

23A - Miscellaneous Secret Documents

24 - Box labeled A-40

25 - Box Labeled A-41

25A - Miscellaneous Confidential Documents

26 - Box Labeled A-42

26A - Miscellaneous Top Secret Documents

27 - Box Labeled A-71

28 - Box Labeled A-73

28A - Miscellaneous Top Secret Documents

Received By: [signature] (signature)

Received From: [redacted] (signature)

Printed Name/Title: Christina Bobb attorney

Printed Name/Title: [redacted] / Special Agent

6:19pm on 8/8/22

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 22-8332-BER

IN RE: SEALED SEARCH WARRANT

_____/

ORDER ON MOTIONS TO UNSEAL[1]

On August 8, 2022, the Government executed a search warrant at 1100 S. Ocean Boulevard, Palm Beach, Florida ("the Premises"). The Premises are a private club that is also the part-time residence of Former President Donald J. Trump.

Numerous intervenors ("Intervenors") now move to unseal materials related to the search warrant. ECF No. 17 at 2. The Intervenors are Judicial Watch (ECF No. 4), Albany Times Union (ECF No. 6), The New York Times Company (ECF No. 9), CBS Broadcasting, Inc. (ECF No. 20), NBCUniversal Media, LLC d/b/a NBC News, Cable News Network, Inc., WP Company, LLC d/b/a The Washington Post, and E.W. Scripps Company (ECF No. 22), The Palm Beach Post (ECF No. 23), The Florida Center for Government Accountability, Inc. (ECF No. 30), The McClatchy Company LLC d/b/a Miami Herald and Times Publishing Company d/b/a Tampa Bay Times (ECF No. 31), Dow Jones & Company, Inc. (ECF No. 32), The Associated Press (ECF No. 33), and ABC, Inc. (ECF No. 49). The Government opposes the request to unseal. ECF No. 59. Neither Former President Trump nor anyone else purporting to be the

[1] This Order memorializes and supplements my rulings from the bench at the hearing on August 18, 2022.

owner of the Premises has filed a pleading taking a position on the Intervenors' Motions to Unseal.

BACKGROUND

On August 5, 2022, the Court issued a search warrant for the Premises after finding probable cause that evidence of multiple federal crimes would be found at the Premises ("the Warrant"). An FBI Special Agent's sworn affidavit ("the Affidavit") provided the facts to support the probable cause finding. The Government submitted (1) a Criminal Cover Sheet, (2) an Application for Warrant by Electronic Means, (3) the Affidavit, (4) a proposed Warrant, (5) a Motion to Seal all of the documents related to the Application and the Warrant, and (6) a proposed Order to Seal (collectively the "Warrant Package"). The Government asserted there was good cause for sealing the entire Warrant Package because public disclosure might lead to an ongoing investigation being compromised and/or evidence being destroyed. ECF No. 2. The Motion to Seal the entire Warrant Package was granted. ECF No. 3. After the search on August 8, 2022, the Government filed an inventory of the seized items (the "Inventory"), as required by Federal Rule of Criminal Procedure 41(f)(1)(D). ECF No. 21.

Beginning on August 10, 2022, the Intervenors filed motions to intervene and to unseal the entire Warrant Package. On August 11, the Government moved to unseal (1) the Warrant and (2) a copy of the Inventory that had been redacted only to remove the names of FBI Special Agents and the FBI case number. ECF No. 18. The Court granted the Government's Motion to Unseal these materials on August 12,

2022. ECF No. 41. Those materials are now publicly available. Therefore, to the extent the Intervenors have moved to unseal the Warrant and the Inventory, the motions are DENIED AS MOOT.

On August 12, 2022, the Government filed under seal redacted copies of several other documents from the Warrant Package — the Criminal Cover Sheet, the Application for a Warrant by Telephone or Other Reliable Electronic Means, the Motion to Seal, and the Sealing Order. ECF No. 57. These materials are redacted only to conceal the identities of an Assistant United States Attorney and an FBI Special Agent. The Government does not oppose unsealing the redacted versions. ECF No. 59 at 2. The Intervenors do not object to the limited redactions. Hrg. Tr. at 8. I find that the redactions are appropriate to protect the identity and personal safety of the prosecutor and investigator. Therefore, to the extent the Intervenors move to unseal these redacted documents, their motions are GRANTED. *See* ECF No. 74.

All that remains, then, is to decide whether the Affidavit should be unsealed in whole or in part. With one notable exception that is not dispositive, the parties agree about the legal principles that apply.[2] They disagree only about how I should apply those principles to the facts. The Government concedes that it bears the burden of justifying why the Affidavit should remain sealed. Hrg. Tr. at 8; s*ee, e.g., DiRussa v. Dean Witter Reynolds Inc.*, 121 F.3d 818, 826 (2d Cir. 1997).

[2] As discussed below, the parties disagree whether a First Amendment right of public access applies to a sealed search warrant and related documents.

APPLICABLE LEGAL PRINCIPLES

It is a foundational principle of American law that judicial proceedings should be open to the public. An individual's right to access judicial records may arise from the common law, the First Amendment, or both. *Chicago Tribune Co. v. Bridgestone/Firestone, Inc.*, 263 F.3d 1304, 1310-12 (11th Cir. 2001). That right of access is not absolute, however. *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 597 (1978). Where a sufficient reason exists, a court filing can be sealed from public view.

"The common law right of access may be overcome by a showing of good cause, which requires balanc[ing] the asserted right of access against the other party's interest in keeping the information confidential." *Romero v. Drummond Co., Inc.*, 480 F.3d 1234, 1246 (11th Cir. 2007) (brackets in original) (quoting *Chicago Tribune,* 263 F.3d at 1309). In deciding whether good cause exists, "courts consider, among other factors, whether allowing access would impair court functions or harm legitimate privacy interests, the degree of and likelihood of injury if made public, the reliability of the information, whether there will be an opportunity to respond to the information, whether the information concerns public officials or public concerns, and the availability of a less onerous alternative to sealing the documents." *Romero,* 480 F.3d at 1246. They also consider "whether the records are sought for such illegitimate purposes as to promote public scandal or gain unfair commercial advantage, whether access is likely to promote public understanding of historically significant events, and whether the press has already been permitted substantial access to the contents of

the records." *Newman v. Graddick*, 696 F.2d 796, 803 (11th Cir. 1983) (citing *Nixon,* 435 U.S. at 596-603 & n.11).

Despite the First Amendment right of access, a document can be sealed if there is a compelling governmental interest and the denial of access is "narrowly tailored to serve that interest." *Globe Newspaper Co. v. Superior Court,* 457 U.S. 596, 606 (1982).

The Eleventh Circuit has not resolved whether the First Amendment right of access applies to pre-indictment search warrant materials. The Government argues, "The better view is that no First Amendment right to access pre-indictment warrant materials exists because there is no tradition of public access to *ex parte* warrant proceedings." ECF No. 59 at 4 n.3. Nevertheless, the Government says that I need not resolve this question because, even under the First Amendment test, a compelling reason exists for continued sealing. *Id.* (citing *Bennett v. United States*, No. 12-61499-CIV, 2013 WL 3821625, at *4 (S.D. Fla. July 23, 2013) (J. Rosenbaum).

I do not need to resolve whether the First Amendment right of access applies here. As a practical matter, the analyses under the common law and the First Amendment are materially the same. Both look to whether (1) the party seeking sealing has a sufficiently important interest in secrecy that outweighs the public's right of access and (2) whether there is a less onerous (or, said differently, a more narrowly tailored) alternative to sealing. As discussed more fully below, in this case, both tests lead to the same conclusion.

DISCUSSION

1. Balancing the Parties' Interests[3]

The Government argues that unsealing the Affidavit would jeopardize the integrity of its ongoing criminal investigation. The Government's motion says, "As the Court is aware from its review of the affidavit, it contains, among other critically important and detailed investigative facts: highly sensitive information about witnesses, including witnesses interviewed by the government; specific investigative techniques; and information required by law to be kept under seal pursuant to Federal Rule of Criminal Procedure 6(e)." ECF No. 59 at 8.

Protecting the integrity and secrecy of an ongoing criminal investigation is a well-recognized compelling governmental interest. *See, e.g., United States v. Valenti*, 987 F.2d 708, 714 (11th Cir. 1993); *Bennett,* 2013 WL 3821625, at *4; *Patel v. United States*, No. 19-MC-81181, 2019 WL 4251269, at *4 (S.D. Fla. Sept. 9, 2019) (J. Matthewman). "Although many governmental processes operate best under public scrutiny, it takes little imagination to recognize that there are some kinds of government operations that would be totally frustrated if conducted openly." *Press-*

[3] "As the Eleventh Circuit has explained, findings in a public order as to the need for sealing 'need not be extensive. Indeed, should a court say too much the very secrecy which sealing was intended to preserve could be impaired. The findings need only be sufficient for a reviewing court to be able to determine, *in conjunction with a review of the sealed documents themselves,* what important interest or interests the district court found sufficiently compelling to justify the denial of public access.'" *United States v. Steinger*, 626 F. Supp. 2d 1231, 1234 (S.D. Fla. 2009) (J. Jordan) (citing and adding emphasis to *United States v. Kooistra,* 796 F.2d 1390, 1391 (11th Cir. 1986)).

Enter. Co. v. Superior Court of Cal. for Riverside Cnty., 478 U.S. 1, 8-9 (1986). Criminal investigations are one such government operation. The Intervenors agree that protecting the integrity of an ongoing criminal investigation can, in the right case, override the common law right of access. Hrg. Tr. at 28.

In the context of an ongoing criminal investigation, the legitimate governmental concerns include whether: (1) witnesses will be unwilling to cooperate and provide truthful information if their identities might be publicly disclosed; (2) law enforcement's ability to use certain investigative techniques in the future may be compromised if these techniques become known to the public; (3) there will be an increased risk of obstruction of justice or subornation of perjury if subjects of investigation know the investigative sources and methods; and (4) if no charges are ultimately brought, subjects of the investigation will suffer reputational damage. *See Douglas Oil Co. of Cal. v. Petrol Stops Nw.*, 441 U.S. 211, 219 n.10 (1979) (discussing importance of secrecy to grand jury investigations) (quoting *United States v. Procter & Gamble*, 356 U.S. 677, 681-82 n.6 (1958)). Most of the cases discussing these principles arise in the grand jury setting. *See, e.g., Sec. & Exch. Comm'n v. Dresser Indus., Inc.*, 628 F.2d 1368, 1382 (D.C. Cir. 1980) (Grand jury secrecy "serves to protect the identities of witnesses or jurors, the substance of testimony, the strategy or direction of the investigation, the deliberations or questions of jurors, and the like."); *see also Pitch v. United States*, 953 F.3d 1226, 1232 (11th Cir. 2020) (discussing "vital purposes" for grand jury secrecy). The same concerns also apply to a pre-indictment search warrant. At the pre-indictment stage, the Government's need to

conceal the scope and direction of its investigation, as well as its investigative sources and methods, is at its zenith. *Blalock v. United States*, 844 F.2d 1546, 1550 n.5 (11th Cir. 1988) ("The courts' concern for grand jury secrecy and for the grand jury's law enforcement function is generally greatest during the investigative phase of grand jury proceedings.") (quoting S. Beale & W. Bryson, *Grand Jury Law & Practice* § 10:18 (1986)). Maximizing the Government's access to untainted facts increases its ability to make a fully-informed prosecutive decision while also minimizing the effects on third parties.

As the Government aptly noted at the hearing, these concerns are not hypothetical in this case. One of the statutes for which I found probable cause was 18 U.S.C. § 1519, which prohibits obstructing an investigation. Also, as some of the media Intervenors have reported, there have been increased threats against FBI personnel since the search. ECF No. 59 at 8 n.5 (citing news articles about threats to law enforcement); *see, e.g.*, Josh Campbell, et al., *FBI Investigating 'Unprecedented' Number of Threats Against Bureau in Wake of Mar-a-Lago Search,* CNN.COM (Aug. 13, 2022), https://www.cnn.com/2022/08/12/politics/fbi-threats-maralago-trump-search/index.html; Nicole Sganga, *FBI and DHS Warn of Increased Threats to Law Enforcement and Government Officials After Mar-a-lago Search*, CBSNEWS.COM (Aug. 15, 2022), https://www.cbsnews.com/news/mar-a-lago-search-fbi-threat-law-enforcement/. An armed man attempted to infiltrate the FBI Office in Cincinnati, Ohio on August 11, three days after the search. Elisha Fieldstadt, et al., *Armed Man Who was at Capitol on Jan. 6 is Fatally Shot After Firing into an FBI Field Office in*

Cincinnati, NBCNEWS.COM (Aug. 11, 2022), https://www.nbcnews.com/news/us-news/armed-man-shoots-fbi-cincinnati-building-nail-gun-flees-leading-inters-rcna42669. After the public release of an unredacted copy of the Inventory, FBI agents involved in this investigation were threatened and harassed. Alia Shoaib, *An Ex-Trump Aide and Right-wing Breitbart News Have Been Separately Accused of Doxxing [sic] the FBI Agents Involved in the Mar-a-Lago Raid*, BUSINESSINSIDER.COM (Aug. 13, 2022), https://www.businessinsider.com/breitbart-trump-aide-doxxing-mar-a-lago-raid-fbi-agents-2022-8. Given the public notoriety and controversy about this search, it is likely that even witnesses who are not expressly named in the Affidavit would be quickly and broadly identified over social media and other communication channels, which could lead to them being harassed and intimidated.

Balancing the Government's asserted compelling need for sealing against the public's interest in disclosure, I give great weight to the following factors:

- There is a significant likelihood that unsealing the Affidavit would harm legitimate privacy interests by directly disclosing the identity of the affiant as well as providing evidence that could be used to identify witnesses. As discussed above, these disclosures could then impede the ongoing investigation through obstruction of justice and witness intimidation or retaliation. This factor weighs in favor of sealing.

- The Affidavit discloses the sources and methods used by the Government in its ongoing investigation. I agree with the Government

that the Affidavit "contains, among other critically important and detailed investigative facts: highly sensitive information about witnesses, including witnesses interviewed by the government; specific investigative techniques; and information required by law to be kept under seal pursuant to Federal Rule of Criminal Procedure 6(e)." ECF No. 59 at 8. Disclosure of these facts would detrimentally affect this investigation and future investigations. This factor weighs in favor of sealing.

- The Affidavit discusses physical aspects of the Premises, which is a location protected by the United States Secret Service. Disclosure of those details could affect the Secret Service's ability to carry out its protective function. This factor weighs in favor of sealing.

- As the Government concedes, this Warrant involves "matters of significant public concern." ECF No. 59 at 7. Certainly, unsealing the Affidavit would promote public understanding of historically significant events. This factor weighs in favor of disclosure.

The Intervenors emphasize that the Court is required to consider if the press has "already been permitted substantial access to the contents of the records." *Newman,* 696 F.2d at 803. The Government acknowledges that the unsealed Warrant and Inventory already disclose "the potential criminal statutes at issue in this investigation and the general nature of the items seized, including documents marked as classified." ECF No. 59 at 7. One Intervenor argues that no privacy

interest remains because "Mr. Trump and his counsel have spoken repeatedly about the government's search and publicly disclosed information about the alleged subject matter of the warrant, including the potential mishandling of classified documents and violations of the Presidential Records Act." ECF No. 32 at 5. Another cites the Government's statement in its Motion to Unseal the Warrant that "the occurrence of the search and indications of the subject matter involved are already public." ECF No. 22 at 7 (citing ECF No. 18 at 3). A third argues:

> The investigation has been made public by the target of the warrant himself, details of the investigation have appeared in publications throughout the world, members of Congress have demanded that the Justice Department provide an explanation, and political commentary on the search continues unabated. In short, with so much publicity surrounding the search, the Court should be skeptical about government claims that disclosure of this true information will invade privacy, disturb the confidentiality of an investigation, tip off potential witnesses, or lead to the destruction of evidence.

ECF No. 8 at 8-9. No one disputes that there has been much public discourse about this Warrant and the related investigation. ECF No. 67 at 7-9 (summarizing issues of public discussion). Nevertheless, much of the information being discussed is based on anonymous sources, speculation, or hearsay; the Government has not confirmed its accuracy.

In any event, these arguments ignore that the contents of the Affidavit identify not just the facts known to the Government, but the sources and methods (i.e., the witnesses and the investigative techniques) used to gather those facts. That information is not known to the public. For the reasons discussed above, the Government has a compelling reason not to publicize that information at this time.

I do not give much weight to the remaining factors relevant to whether the common law right of access requires unsealing of the Affidavit. *See Romero, supra; Newman, supra.* Allowing access to the unredacted Affidavit would not impair court functions. Having carefully reviewed the Affidavit before signing the Warrant, I was — and am — satisfied that the facts sworn by the affiant are reliable. So, releasing the Affidavit to the public would not cause false information to be disseminated. There is no indication that the Intervenors seek these records for any illegitimate purpose.

After weighing all the relevant factors, I find that the Government has met its burden of showing good cause/a compelling interest that overrides any public interest in unsealing the full contents of the Affidavit.

2. Narrowly Tailoring/Least Onerous Alternatives

I must still consider whether there is a less onerous alternative to sealing the entire document. The Government argues that redacting the Affidavit and unsealing it in part is not a viable option because the necessary redactions "would be so extensive as to render the document devoid of content that would meaningfully enhance the public's understanding of these events beyond the information already now in the public record." ECF No. 59 at 10; *see also Steinger*, 626 F. Supp. 2d at 1237 (redactions not feasible because they would "be so heavy as to make the released versions incomprehensible and unintelligible."). I cannot say at this point that partial redactions will be so extensive that they will result in a meaningless disclosure, but I may ultimately reach that conclusion after hearing further from the Government.

The Government argues that even requiring it to redact portions of the Affidavit that could not reveal agent identities or investigative sources and methods imposes an undue burden on its resources and sets a precedent that could be disruptive and burdensome in future cases. I do not need to reach the question of whether, in some other case, these concerns could justify denying public access; they very well might. Particularly given the intense public and historical interest in an unprecedented search of a former President's residence, the Government has not yet shown that these administrative concerns are sufficient to justify sealing.

I therefore reject the Government's argument that the present record justifies keeping the entire Affidavit under seal. In its Response, the Government asked that I give it an opportunity to propose redactions if I declined to seal the entire Affidavit. I granted that request and gave the Government a deadline of noon on Thursday, August 25, 2022. ECF No. 74. Accordingly, it is hereby ORDERED that by the deadline, the Government shall file under seal a submission addressing possible redactions and providing any additional evidence or legal argument that the Government believes relevant to the pending Motions to Unseal.

DONE and ORDERED in Chambers this 22nd day of August, 2022, at West Palm Beach in the Southern District of Florida.

BRUCE E. REINHART
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
WEST PALM BEACH DIVISION

CASE NO. 22-CV-81294-CANNON

DONALD J. TRUMP,

Plaintiff,

v. **UNDER SEAL AND *EX PARTE***

UNITED STATES OF AMERICA,

Defendant.
_____/

DETAILED PROPERTY INVENTORY
PURSUANT TO COURT'S PRELIMINARY ORDER

Item #1 – Documents from Office
1 US Government Document with SECRET Classification Markings
2 US Government Documents/Photographs without Classification Markings

Item #2 – Box/Container from Office
99 Magazines/Newspapers/Press Articles and Other Printed Media dated between 01/2017-10/2018
2 US Government Documents with CONFIDENTIAL Classification Markings
15 US Government Documents with SECRET Classification Markings
7 US Government Documents with TOP SECRET Classification Markings
69 US Government Documents/Photographs without Classification Markings
43 Empty Folders with "CLASSIFIED" Banners
28 Empty Folders Labeled "Return to Staff Secretary/Miliary Aide"

Item #3 – Documents from Office
2 US Government Documents/Photographs without Classification Markings

Item #4 – Documents from Office

26 Magazines/Newspapers/Press Articles and Other Printed Media dated between 01/2020-11/2020
1 US Government Document with CONFIDENTIAL Classification Markings
1 US Government Documents with SECRET Classification Markings
357 US Government Documents/Photographs without Classification Markings

Item #5 – Documents from Office
396 US Government Documents/Photographs without Classification Markings

Item #6 – Documents from Office
640 US Government Documents/Photographs without Classification Markings

Item #7 – Documents from Office
1 US Government Document/Photograph without Classification Markings

Item #8 – Box/Container from Storage Room
68 Magazines/Newspapers/Press Articles and Other Printed Media dated between 10/2015-05/2017
1 Article of Clothing/Gift Item
1 Book
2 US Government Documents/Photographs without Classification Markings

Item #9 – Box/Container from Storage Room
91 Magazines/Newspapers/Press Articles and Other Printed Media dated between 01/2019-09/2020
1 Article of Clothing/Gift Item
65 US Government Documents/Photographs without Classification Markings

Item #10 – Box/Container from Storage Room
30 Magazines/Newspapers/Press Articles and Other Printed Media dated between 10/2008-12/2019
11 US Government Documents with CONFIDENTIAL Classification Markings
21 US Government Documents with SECRET Classification Markings

3 Articles of Clothing/Gift Items
1 Book
255 US Government Documents/Photographs without Classification Markings

Item #11 – Box/Container from Storage Room
116 Magazines/Newspapers/Press Articles and Other Printed Media dated between 06/2019-08/2020
8 US Government Documents with CONFIDENTIAL Classification Markings
1 US Government Document with SECRET Classification Markings
2 US Government Document with TOP SECRET Classification Markings
104 US Government Documents/Photographs without Classification Markings

Item #12 – Box/Container from Storage Room
39 Magazines/Newspapers/Press Articles and Other Printed Media dated between 01/2017-03/2020
71 US Government Documents/Photographs without Classification Markings

Item #13 – Box/Container from Storage Room
62 Magazines/Newspapers/Press Articles and Other Printed Media dated between 09/2018 -08/2019
2 US Government Documents with CONFIDENTIAL Classification Markings
1 US Government Document with TOP SECRET Classification Markings
1 Article of Clothing/Gift Items
708 US Government Documents/Photographs without Classification Markings

Item #14 – Box/Container from Storage Room
87 Magazines/Newspapers/Press Articles and Other Printed Media dated between 01/2018-11/2019
2 US Government Documents with CONFIDENTIAL Classification Markings
438 US Government Documents/Photographs without Classification Markings

Item #15 – Box/Container from Storage Room
65 Magazines/Newspapers/Press Articles and Other Printed Media dated between 10/2016-11/2018

1 US Government Documents with CONFIDENTIAL Classification Markings
4 US Government Document with SECRET Classification Markings
2 Books
78 US Government Documents/Photographs without Classification Markings
2 Empty Folders with "CLASSIFIED" Banners
2 Empty Folders Labeled "Return to Staff Secretary/Miliary Aide"

Item #16 – Box/Container from Storage Room
76 Magazines/Newspapers/Press Articles and Other Printed Media dated between 11/2017-12/2017
60 US Government Documents/Photographs without Classification Markings

Item #17 – Box/Container from Storage Room
67 Magazines/Newspapers/Press Articles and Other Printed Media dated between 7/2016 – 3/2017
5 Articles of Clothing/Gift Items
2 US Government Documents/Photographs without Classification Markings

Item #18 – Box/Container from Storage Room
4 Magazines/Newspapers/Press Articles and Other Printed Media dated between 01/2018 – 12/2019
1 US Government Document with SECRET Classification Markings
1 Book
1571 US Government Documents/Photographs without Classification Markings
2 Empty Folders Labeled "Return to Staff Secretary/Miliary Aide"

Item #19 – Box/Container from Storage Room
53 Magazines/Newspapers/Press Articles and Other Printed Media dated between 05/2016 – 01/2020
1 US Government Documents with CONFIDENTIAL Classification Markings
5 Articles of Clothing/Gift Items
236 US Government Documents/Photographs without Classification Markings

Item #20 – Box/Container from Storage Room

121 Magazines/Newspapers/Press Articles and Other Printed Media dated between 08/2017-12/2017
16 US Government Documents/Photographs without Classification Markings

Item #21 – Box/Container from Storage Room
2 Magazines/Newspapers/Press Articles and Other Printed Media dated 11/2020
1406 US Government Documents/Photographs without Classification Markings

Item #22 – Box/Container from Storage Room
109 Magazines/Newspapers/Press Articles and Other Printed Media dated between 06/2020 – 10/2020
29 US Government Documents/Photographs without Classification Markings

Item #23 – Box/Container from Storage Room
67 Magazines/Newspapers/Press Articles and Other Printed Media dated between 11/2016 – 06/2018
1 US Government Document with SECRET Classification Markings
1 Book
70 US Government Documents/Photographs without Classification Markings
8 Empty Folders Labeled "Return to Staff Secretary/Miliary Aide"

Item #24 – Box/Container from Storage Room
1 Magazines/Newspapers/Press Articles and Other Printed Media dated circa 2018
1603 US Government Documents/Photographs without Classification Markings

Item #25 – Box/Container from Storage Room
76 Magazines/Newspapers/Press Articles and Other Printed Media dated between 10/2016 – 11/2017
1 US Government Documents with CONFIDENTIAL Classification Markings
1 US Government Document with SECRET Classification Markings
20 US Government Documents/Photographs without Classification Markings
1 Empty Folder with "CLASSIFIED" Banner

Item #26– Box/Container from Storage Room

8 Magazines/Newspapers/Press Articles and Other Printed Media dated between 12/2017 – 3/2020
3 US Government Document with TOP SECRET Classification Markings
1 Article of Clothing/Gift Items
1 Book
1841 US Government Documents/Photographs without Classification Markings

Item #27– Box/Container from Storage Room
1 Magazines/Newspapers/Press Articles and Other Printed Media dated between 07/2016 – 9/2020
1 Article of Clothing/Gift Items
23 Books
52 US Government Documents/Photographs without Classification Markings

Item #28 – Box/Container from Storage Room
2 Magazines/Newspapers/Press Articles and Other Printed Media dated between 2/2017 – 3/2017
2 US Government Documents with CONFIDENTIAL Classification Markings
8 US Government Document with SECRET Classification Markings
4 US Government Document with TOP SECRET Classification Markings
1 Article of Clothing/Gift Items
1 Book
795 US Government Documents/Photographs without Classification Markings

Item #29 – Box/Container from Storage Room
86 Magazines/Newspapers/Press Articles and Other Printed Media dated between 10/1995 – 05/2019
1 US Government Document with TOP SECRET Classification Markings
35 US Government Documents/Photographs without Classification Markings

Item #30 – Box/Container from Storage Room
29 Magazines/Newspapers/Press Articles and Other Printed Media dated between 05/2020 – 09/2020
82 US Government Documents/Photographs without Classification Markings

Item # 31– Box/Container from Storage Room
111 Magazines/Newspapers/Press Articles and Other Printed Media dated between 06/2015 – 04/2019
41 US Government Documents/Photographs without Classification Markings

Item #32 – Box/Container from Storage Room
94 Magazines/Newspapers/Press Articles and Other Printed Media dated between 02/2008 – 04/2020
1 Book
88 US Government Documents/Photographs without Classification Markings

Item #33 – Box/Container from Storage Room
83 Magazines/Newspapers/Press Articles and Other Printed Media dated between 02/2017 – 02/2018
1 Book
44 US Government Documents/Photographs without Classification Markings
2 Empty Folders with "CLASSIFIED" Banners
2 Empty Folders Labeled "Return to Staff Secretary/Miliary Aide"